LL.B. I Term

Law of Crimes-I: Bharatiya Nyaya Sanhita, 2023

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LL.B. –First Semester

Paper Title: Law of Crimes-I: Bharatiya Nyaya Sanhita, 2023

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Course Objectives:

- To familiarize the students with the key concepts regarding crime and general principles of criminal liability.
- To expose the students to the range of mental states that constitute the mental element *mens rea* essential to constitute criminal behavior and the grounds that provide exemption from criminal liability.
- To educate the students about the shift of orientation in Bharatiya Criminal justice system from punishments towards *Nyaya* and introduction of community service as a form of punishment.
- To teach students about acts that amount to specific offences under the Bharatiya Nyaya Sanhita, 2023 along with the latest legislative and judicial developments in the field of Criminal Law.

Learning Outcomes: Upon successful completion of this course, the students shall gain the competence to:

1. Identify the elements of a crime and distinguish between behaviours that entail civil or criminal liability.
2. Be familiar with the range of specific offences provided under the Bharatiya Nyaya Sanhita, 2023.
3. Assess and analyze the statutory provisions in the light of settled legal principles.

Prescribed legislation:

The Bharatiya Nyaya Sanhita, 2023.

Prescribed Books:

1) Vageshwari Deswal & Saurabh Kansal, ***Bharatiya Nyaya Sanhita, 2023 Law and Practice*** (Taxmann, New Delhi, 2024).

2) K.T. Thomas, M.A. Rashid (Rev.), **Ratan Lal & Dhiraj Lal's *The Indian Penal Code,*** (35^{th} ed., 2017).

3) K.D. Gaur, ***Criminal Law : Cases and Materials,*** (8th ed., 2015).
4) R.C. Nigam, ***Law of Crimes in India*** (Vol. I) (1965).
5) V.B. Raju, ***Commentary on Indian Penal Code***, 1860 (Vol. I & II) (4th ed., 1982).
6) K.N.C. Pillai & Shabistan Aquil (Rev.), ***Essays on the Indian Penal Code*** (The Indian Law Institute, 2005).
7) K. I. Vibhute (Rev.), **P.S.A. Pillai's *Criminal Law*** (13th ed., 2017).
8) Syed Shamsul Huda, ***The Principles of the Law of Crimes in British India*** (1902).
9) K.N. Chandrasekharan Pillai, ***General Principles of Criminal Law*** (2nd ed., 2011).

UNITS

Unit 1: Elements of Crime

- Distinction between Civil and Criminal liability
- Principle of *Mens rea* and Strict liability
- Types of Punishments prescribed under BNS, 2023 (S. 4-13)
- Retention of Death Penalty and Introduction of Community Service

Case Laws

- State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722
- State of MP v. Narayan Singh, (1989) 3 SCC 596
- *Machhi Singh and Others v. State of Punjab, AIR 1983 SC 957

Unit 2: General Exceptions (S. 22, 23, 24, 34-44)

- Unsoundness of Mind
- Intoxication
- Private Defence

Case Laws

- *Basdev v. State of PEPSU AIR 1956 SC 488

- *Srikant Anandrao Bhosale v. State of Maharshtra (2003) 7 SCC 748
- Deo Narain v. State of UP AIR 1973 SC 473
- James Martin v. State of Kerala (2004) 2 SCC 203
- Darshan Singh v. State of Punjab, (2010) 1 S.C.R. 642

Unit 3: Inchoate Crimes (S. 45-62, 107-109, 226)

- Abetment
- Criminal Conspiracy
- Attempt

Case Laws

- *Satvir Singh v. State of Punjab, AIR 2001 SC 2828
- *State of Tamil Nadu v. Nalini and 25 others (AIR 1999 SC 2649)
- State of Maharashtra v. Mod. Yakub (1980)3 SCC 57
- Gian Kaur v. State of Punjab (1996) 2 SCC 648

Unit 4: Joint Liability and Group Liability

- Common Intention [S. 3(5)(6)(7)(8)(9)]
- Common object, Unlawful Assembly (S. 189)
-

Case Laws

- Suresh v. State of UP (2001) 3 SCC 673
- Maina Singh v. State of Rajasthan (1976) 2 SCC 827

Unit 5: Offences against Women

- Sexual Offences (S. 63-73)
- Of Criminal force and Assault against Woman (S.74-79)
- Offences relating to marriage (S. 80-87)

Case Laws

- Kanwar Pal Singh Gill v. State (Adm., U.T. Chandigarh) through Secy., (2005) 6 SCC 161
- State of Punjab v. Gurmit Singh, (1996) 2 SCC 384
- State of U.P v. Chhoteylal, AIR 2011 SC 697
- Deepak Gulati v. State of Haryana, (2013) 7 SCC 675
- *Independent Thought v. Union of India (2017) 10 SCC 800
- Social Action Forum for Manav Adhikar and Another v. Union of India and Ors. Minstry Law and Justice and others AIR 2018 SC 4273

Unit 6: Offences affecting Human Body (Part 1)

Offences affecting Life (S. 100-105)

- Culpable Homicide
- Murder

Case Laws

- Rawalpenta Venkalu v. State of Hyderabad, AIR 1956 SC 171
- Palani Goundan v. Emperor, 1919 ILR 547
- In re Thavamani, AIR 1943 Mad 571
- Emperor v. Mushnoorunarayna Murthy (1912) 22 MLJR 333 Mad
- Virsa Singh v. State of Punjab, AIR 1958 SC 465
- State of AP v. R, Punnayya, AIR 1977 SC 45
- Emperor v. Dhirajia, AIR 1940 All. 486
- Gyarsibai v. The State AIR 1953 M.B. 61
- KM Nanavati v. State of Maharashtra AIR 1962 SC 605
- Ghapoo Yadav v. State of MP (2003) 3 SCC 528
- Tehseen S. Poonawalla v. Union of India, (2018) 9 SCC 501

Unit 7: Offences affecting Human Body (Part II)

Offences affecting Life (S. 106, 11, 112, 113)

- Causing Death by Negligence
- Organised Crime

- Petty Organised Crime
- Terrorist Act

Case Laws

- Cherubin Gregory v. State of Bihar AIR 1964 SC 205
- SN Hussain v. State of Andhra Pradesh, AIR 1972 SC 685

Unit 8: Specific Crimes against Children, Human Body and the State (S. 137, 138, 143, 95, 98, 99, 152)

- Kidnapping
- Abduction
- Trafficking
- Hiring/ employing/ engaging a child to commit an offence
- Selling/buying child for purpose of prostitution, etc.
- Act endangering Sovereignty, Unity and Integrity of India

Case Laws

- S. Vardrajan v. State of Madras, AIR 1965 SC 942
- Thakorlal D. Vadgama v. State of Gujarat AIR 1973 SC 2313
- Anversinh Alias Kiransinh Fatesinh Zala v. State of Gujarat, (2021) 3 SCC 12
- *Vinod Dua v. Union of India AIR 2021 SC 3239

Unit 9: Offences against Property (Part-1) (S. 2 (21), 303-313)

- Theft
- Extortion
- Robbery
- Dacoity

Case Laws

- Pyare Lal Bhargava v. State of Rajasthan AIR 1963 SC 1094
- State of Karnataka v. Basavegowda (1997) Cr. L.J. 4386 (Kant) 288

Unit 10: Offences against Property (Part-II)
(S. 314-316, 318, 319)

- Criminal Misappropriation of Property
- Criminal Breach of Trust
- Cheating

Case Laws

- Jaikrishandas Manohardas Desai v. State of Bombay, AIR 1960 SC 889
- Mahadeo Prasad v. State of West Bengal, AIR 1954 SC 724
- Akhil Kishore Ram v. Emperor, AIR 1938 Pat, 185

GENERAL INTRODUCTION

NATURE AND DEFINITION OF CRIME*

I. NATURE OF CRIME

WHAT IS A CRIME? We must answer this question at the outset. In order to answer this question we must know first, what is law because the two questions are closely inter-related. Traditionally, we know a law to be a command enjoining a course of conduct. The command may be of a sovereign or of political superiors to the political inferiors; or it may be the command of a legally constituted body or a legislation emanating from a duly constituted legislature to all the members of the society. A crime may, therefore, be an act of disobedience to such a law forbidding or commanding it. But then disobedience of all laws may not be a crime, for instance, disobedience of civil laws or laws of inheritance or contracts. Therefore, a crime would mean something more than a mere disobedience to a law, "it means an act which is both forbidden by law and revolting to the moral sentiments of the society." Thus robbery or murder would be a crime, because they are revolting to the moral sentiments of the society, but a disobedience of the revenue laws or the laws of contract would not constitute a crime. Then again, "the moral sentiments of a society" is a flexible term, because they may change, and they do change from time to time with the growth of the public opinion and the social necessities of the times. So also, the moral values of one country may be and often are quite contrary to the moral values of another country. To cite a few instances, heresy was a crime at one time in most of the countries of the world, because in those days it offended the moral sentiments of the society. It was punished with burning. But nobody is punished nowadays for his religious beliefs, not even in a theocratic state. The reason is obvious. Now it does not offend the moral sentiments of the society. Adultery is another such instance. It is a crime punishable under our Penal Code, but it is not so in some of the countries of the West. Then again *suttee,* i.e., burning of a married woman on the funeral pyre of her deceased husband, was for a long time considered to be a virtue in our own country, but now it is a crime. Similarly, polygamy was not a crime in our country until it was made so by the Hindu Marriage Act, 1955. This Act, it may

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*R.C Nigam, *LAW OF CRIMES IN INDIA*25-37(1965)

be stated, does not apply to Mohammedans or Christians. But Christians are forbidden to practise polygamy under their law of marriage, while Mohammedans are yet immune from punishment for polygamy. All these instances go to show that the content of crime changes from time to time in the same country and from country to country at the same time because it is conditioned by the moral value approved of by a particular society in a particular age in a particular country. A crime of yesterday may become a virtue tomorrow and so also a virtue of yesterday may become a crime tomorrow. Such being the content of crime, all attempts made from time to time beginning with Blackstone down to Kenny in modern times to define it have proved abortive. Therefore, the present writer agrees with Russell when he observes that "to define crime is a task which so far has not been satisfactorily accomplished by any writer. In fact, criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing the sovereign power in the state to repress conduct which they feel may endanger their position".

But a student embarking on study of principles of criminal law must understand the chief characteristics and the true attributes of a crime. Though a crime, as we have seen, is difficult of a definition in the true sense of the term, a definition of a crime must give us "the whole thing and the sole thing," telling us something that shall be true of every crime and yet not be true of any other conceivable non-criminal breach of law. We cannot produce such a definition of crime as might be flexible enough to be true in all countries, in all ages and in all times. Nevertheless, a crime may be described and its attributes and characteristics be clearly understood. In order to achieve this object, we propose to adopt two ways, namely, first, we shall distinguish crime from civil and moral wrongs, and *secondly,* we shall critically examine all the definitions constructed by the eminent criminal jurists from time to time.

II. DISTINCTION BETWEEN MORAL, CIVIL AND CRIMINAL WRONGS

In order to draw a distinction between civil and criminal liability, it becomes necessary to know clearly what is a wrong of which all the three are species. There are certain acts done by us which a large majority of civilised people in the society look upon with disapprobation, because they tend to reduce the sum total of human happiness, to conserve which is the ultimate aim of all laws. Such

acts may be called wrongs, for instance, lying, gambling, cheating, stealing, homicide, proxying in the class, gluttony and so on. The evil tendencies and the reflex action in the society of these acts or wrongs, as we have now chosen to call them, differ in degree. Some of them are not considered to be serious enough as to attract law's notice. We only disapprove of them. Such wrongs may be designated as moral wrongs, for instance, lying, overeating or gluttony, disobedience of parents or teachers, and so on. Moral wrongs are restrained and corrected by social laws and laws of religion.

There are other wrongs which are serious enough to attract the notice of the law. The reaction in the society is grave enough and is expressed either by infliction of some pain on the wrongdoer or by calling upon him to make good the loss to the wronged person. In other words, law either awards punishment or damages according to the gravity of the wrong done. If the law awards a punishment for the wrong done, we call it a crime; but if the law does not consider it serious enough to award a punishment and allows only indemnification or damages, we call such a wrong as a civil wrong or tort. In order to mark out the distinction between crimes and torts, we have to go deep into the matter and study it rather elaborately.

Civil and Criminal Wrongs: We may state, broadly speaking, *first,* that crimes are graver wrongs than torts. There are three reasons for this distinction between a crime and a tort. First, they constitute greater interference with the happiness of others and affect the well-being not only of the particular individual wronged but of the community as a whole. Secondly, because the impulse to commit them is often very strong and the advantage to be gained from the wrongful act and the facility with which it can be accomplished are often so great and the risk of detection so small that human nature, inclined as it is to take the shortest cut to happiness, is more likely to be tempted, more often than not, to commit such wrongs. A pickpocket, a swindler, a gambler are all instances. Thirdly, ordinarily they are deliberate acts and directed by an evil mind and are hurtful to the society by the bad example they set. Since crimes are graver wrongs, they are singled out for punishment with four-fold objects, namely,of making an example of the criminal, of deterring him from repeating the same act, of reforming him by eradicating the evil, and of satisfying the society’s feeling of vengeance. Civil wrongs, on the other hand, are less serious wrongs, as the effect of such wrongs is supposed to be confined mainly to individuals and does not affect the community at large.

Secondly, the accused is treated with greater indulgence than the defendant in civil cases. The procedure and the rules of evidence are modified in order to reduce to a minimum the risk of an innocent person being punished. For example, the accused is not bound to prove anything, nor is he required to make any statement in court, nor is he compellable to answer any question or give an explanation. However, under the Continental Laws an accused can be interrogated.

Thirdly, if there is any reasonable doubt regarding the guilt of the accused, the benefit of doubt is always given to the accused. It is said that it is better that ten guilty men should escape rather than an innocent person should suffer. But the defendant in a civil case is not given any such benefit of doubt.

Fourthly, crimes and civil injuries are generally dealt with in different tribunals. The former are tried in the criminal courts, while the latter in the civil courts.

Fifthly, in case of a civil injury, the object aimed at is to indemnify the individual wronged and to put him as far as practicable in the position he was, before he was wronged. Therefore he can compromise the case, whereas in criminal cases generally the state alone, as the protector of the rights of its subjects, pursues the offender and often does so in spite of the injured party. There are, however, exceptions1o this rule.

Lastly, an act in order to be criminal must be done with malice or criminal intent. In other words, there is no crime without an evil intent. *Actus non facit reum nisi mens sit rea,* which means that the act alone does not make .a man guilty unless his intentions were so. This essential of the crime distinguishes it from civil injuries.

Criminal and Moral Wrongs: A criminal wrong may also be distinguished from a moral wrong. It is narrower in extent than a moral wrong. In no age or in any nation an attempt has ever been made to treat every moral wrong as a crime. In a crime an idea of some definite gross undeniable injury to someone is involved. Some definite overt act is necessary, but do we punish a person for ingratitude, hard-heartedness, absence of natural affection, habitual idleness, avarice, sensuality and pride, which are all instances of moral lapses? They might be subject of confession and penance but not criminal proceeding. The criminal law, therefore, has a limited scope. It applies only to definite acts of commission and omission, capable of being distinctly proved. These acts of commission and omission cause definite evils either on definite persons or on the community at large. Within these narrow limits there may be a likeness between criminal law and morality. For instance, offences like murder, rape,

arson, robbery, theft and the like are equally abhorred by law and morality. On the other hand, there are many acts which are not at all immoral, nonetheless they are criminal. For example, breaches of statutory regulations and bye laws are classed as criminal offences, although they do not involve the slightest moral blame. So also “the failure to have a proper light on a bicycle or keeping of a pig in a wrong place," or the neglect in breach of a bye-law to cause a child to attend school during the whole of the ordinary school hours; and conversely many acts of great immorality are not criminal offences, as for example, adultery in England, or incest in India. However, whenever law and morals unite in condemning an act, the punishment for the act is enhanced.

Stephen on the relationship between criminal law and morality observes:

The relation between criminal law and morality is not in all cases the same. The two may harmonise; there may be a conflict between them, or they may be independent. In all common cases they do, and, in my opinion, wherever and so far as it is possible, they ought to harmonise with and support one another. Everything which is regarded as enhancing the moral guilt of a particular offence is recognised as a reason for increasing the severity of the punishment awarded to it. On the other hand, the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgement what might otherwise be a transient sentiment. The mere general suspicion or knowledge that a man has done something dishonest may never be brought to a point, and the disapprobation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief stamps a mark upon him for life. In short, the infliction of punishment by law gives definite expression and a solemn ratification and a justification to the hatred which is excited by the commission of the offence, and which constitutes the ll1oral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The crill1inal law thus proceeds upon the principle that it is ll1orally right to hate crill1inals, and it confirms and justifies that sentill1ent by inflicting upon criminals punishments which express it.

Criminal Law and Ethics: Let us also distinguish criminal law from ethics. Ethics is a study of the supreme good. It deals with absolute ideal, whereas positive morality deals with current public opinion, and law is concerned with social relationship of men rather than with the individual's excellence of character. The distinction between law and morality has been discussed

already. We may now bring out the distinction between law and ethics by citing two illustrations. Your neighbour, for instance, is dying of starvation. Your granary is full. Is there any law that requires you to help him out of your plenty? It may be ethically wrong or morally wrong; but not criminally wrong. Then again, you are standing on the bank of a tank. A woman is filling her pitcher. All of a sudden she gets an epileptic fit. You do not try to save her. You may have committed an ethical wrong or a moral wrong, but will you be punished criminally? However, with the growth of the humanitarian ideas, it is hoped that the conception of one's duty to others will gradually expand, and a day might arrive when it may have to conform-to the ideal conduct which the great Persian Poet. Sheikh Saadi, aimed at, viz.: "If you see a blind man proceeding to a well, if you are silent, you commit a crime." This was what the poet said in the 13th century. But we may have to wait for a few more decades, when we might give a different answer to the question: "Am I my brother's keeper?"

Are Crimes and Torts Complementary? In the foregoing, we have drawn a clear distinction between crimes and civil injuries. In spite of those distinctions, however, it should be remembered that crimes and torts are complementary and not exclusive of each other. Criminal wrongs and civil wrongs are thus not sharply separated groups of acts but are often one and the same act as viewed from different standpoint, the difference being not one of nature but only of relation. To ask concerning any occurrence, "is this a crime or a tort?" is, to borrow Sir James Stephen's apt illustration, no wiser than it would be to ask of a man, "Is he a father or a son? For he may be both." In fact, whatever is within the scope of the penal law is crime, whatever is a ground for a claim of damages, as for an injury, is a tort; but there is no reason why the same act should not belong to both classes, arid many acts do. In fact, some torts or civil injuries were erected and are being erected into crimes, whenever the law-making hand comes to regard the civil remedy for them as being inadequate. But we cannot go so far as to agree with Blackstone when he makes a sweeping observation that "universally every crime is a civil injury." This observation of Blackstone is proved incorrect in the following three offences which do not happen to injure any particular individual. *First,* a man publishes a seditious libel or enlists recruits for the service of some foreign belligerent. In either of these cases an offence against the state has been committed but no injury is caused to any particular individual. *Secondly,* an intending forgerer, who is found in possession of a block for the purpose of forging a trade mark or engraving a bank-note or for forging a currency note,

commits a serious offence but he causes no injury to any individual. *Thirdly,* there are cases where though a private individual does actually suffer by the offence, yet the sufferer is no other than the actual criminal himself who, of course, cannot claim compensation against himself, for example, in cases of attempted suicide. However, in England as elsewhere the process of turning of private wrongs into public ones is not yet complete, but it is going forward year to year. For instance, the maiming or killings of another man's cattle were formerly civil wrongs but they were made crimes in the Hanoverian reign. Then again, it was not until 1857 a crime for a trustee to commit a breach of trust. So also, incest was created a crime in 1908. In fact, the categories of crimes are not closed. In our own country, since Independence, many acts have now been enacted into crimes which we could not even have conceived of, for instance, practice of untouchability or forced labour or marrying below a certain age and so on. A socialistic state does conceive of many anti-social behaviours punishable as crimes more frequently.

We must remember that crime is a relative concept and a changing one too. Different societies have different views as to what constitutes a criminal act and the conception of a crime may vary with the age, locality and several other facts and circumstances. For example, people were burned for heresy a few centuries ago, but in modern times no civilised nation punishes a man on the ground that he professes a different religious view. Then again, adultery is a crime according to our penal code, while it is a civil wrong according to English law.

CONSTITUENT ELEMENTS OF CRIME*

ELEMENTS OF A CRIME

The two elements of crime are mens rea and *actus reus*. Apart from these two elements that go to make up a crime, there are two more indispensable elements, namely, first, "a human being under a legal obligation to act in a particular way and a fit subject for the infliction of appropriate punishment," and secondly, "an injury to another human being or to the society at large." Thus the four elements that go to constitute a crime are as follows: *first*, a human being under a legal obligation to act in a particular way and a fit subject for the infliction of appropriate punishment: *secondly*, an evil intent or *mens rea* on the part of such human being; *thirdly*, *actus reus*, i.e., act committed or omitted in furtherance of such an intent; and *fourthly*, an injury to another human being or to society at large by such an act.

A Human Being: The first element requires that the act should have been done by a human being before it can constitute a crime punishable at law. The human being must be "under a legal obligation to act, and capable of being punished."
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***Mens Rea*:** The *second element*, which is an important essential of a crime, is *mens rea* or guilty mind. In the entire field of criminal law there is no important doctrine than that of *mens rea*. The fundamental principle of English Criminal jurisprudence, to use a maxim which has been familiar to lawyers following the common law for several centuries, is "*actus non facit reum nisi mens sit rea*". *Mens rea* is the state of mind indicating culpability, which is required by statute as an element of a crime. It is commonly taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negatives the intention of a crime. The term '*mens rea*' has been given to volition, which is the motive force behind the criminal act. It is also one of the essential ingredients of criminal liability.

As a general rule every crime requires a mental element, the nature of which will depend upon the definition of the particular crime in question. Even in crimes of strict liability some mental element is required. Expressions connoting

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* ***Edited from:*** R. C. Nigam, *LAW OF CRIMES IN INDIA* 38-43 (1965); V. Suresh and D. Nagasaila (eds.), *P.S. ATCHUTHEN PILLAI'S CRIMINAL LAW* 42-47(9th edn., 2006)

the requirement of a mental element include: 'with intent', 'recklessly', 'unlawfully', 'maliciously', 'unlawfully and maliciously', 'wilfully', 'knowingly', 'knowing or believing', 'fraudulently', 'dishonestly', 'corruptly', 'allowing', and 'permitting'. Each of these expressions is capable of bearing a meaning, which differs from that ascribed to any other. The meaning of each must be determined in the context in which it appears, and the same expression may bear a different meaning in different contexts. Under the IPC, guilt in respect of almost all offences is fastened either on the ground of intention or knowledge or reason to believe. All the offences under the Code are qualified by one or the other words such as wrongful gain or wrongful loss, dishonestly, fraudulently, reason to believe, criminal knowledge or intention, intentional co-operation, voluntarily, malignantly, wantonly. All these words describe the mental condition required at the time of commission of the offence, in order to constitute an offence. Thus, though the word *mens rea* as such is nowhere found in the IPC, its essence is reflected in almost all the provisions of the code. The existence of the mental element or guilty mind or *mens rea* at the time of commission of the *actus reus* or the act alone will make the act an offence.

Generally, subject to both qualification and exception, a person is not criminally liable for a crime unless he intends to cause, foresees that he will probably cause, or at the lowest, foresees that he may cause, the elements which constitute the crime in question. Although the view has been expressed that it is impossible to ascribe any particular meaning to the term *mens rea*, concepts such as those of intention, recklessness and knowledge are commonly used as the basis for criminal liability and in some respects may be said to be fundamental to it:

Intention: To intend is to have in mind a fixed purpose to reach a desired objective; it is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. The idea foresees but also desires the possible consequences of his conduct. The idea of 'intention' in law is not always expressed by the words 'intention', 'intentionally' or 'with intent to'. It is expressed also by words such as 'voluntarily', 'wilfully' or 'deliberately' etc. Section 298 IPC makes the uttering of words or making gestures with deliberate intent to wound the religious feelings punishable under the Act. ON a plain reading of the section, the words 'deliberate' and 'intent' seem synonymous. An act is intentional if, and in so far as it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied. Intention does not mean ultimate aim and object. Nor is it a synonym for motive.

Transferred intention: Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen. A, intends to kill B by poisoning. A places a glass of milk with poison on the table of B knowing that at the time of going to bed B takes glass of milk. On that fateful night instead of B, C enters the bedroom of B and takes the glass of milk and dies in consequence. A is liable for the killing of C under the principle of transferred intention or malice.

Intention and Motive: Intention and motive are often confused as being one and the same. The two, however, are distinct and have to be distinguished. The mental element of a crime ordinarily involves no reference to motive. Motive is something which prompts a man to form an intention. Intention has been defined as the fixed direction of the mind to a particular object, or determination to act in a particular manner and it is distinguishable from motive which incites or stimulates action. Sometimes, motive plays an important role and becomes a compelling force to commit a crime and, therefore, motive behind the crime become a relevant factor for knowing the intention of a person. In ***Om Prakash* v. *State of Uttranchal*** [(2003) 1 SCC 648] and ***State of UP* v. *Arun Kumar Gupta*** [(2003) 2 SCC 202] the Supreme Court rejected the plea that the prosecution could not signify the motive for the crime holding that failure to prove motive is irrelevant in a case wherein the guilt of the accused is proved otherwise. It needs to be emphasised that motive is not an essential element of an offence but motive helps us to know the intention of a person. Motive is relevant and important on the question of intention.

Intention and knowledge: The terms 'intention' and 'knowledge' which denote *mens rea* appear in Sections 299 and 300, having different consequences. Intention and knowledge are used as alternate ingredients to constitute the offence of culpable homicide. However, intention and knowledge are two different things. Intention is the desire to achieve a certain purpose while knowledge is awareness on the part of the person concerned of the consequence of his act of omission or commission, indicating his state of mind. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things. There may be knowledge of the likely consequences without any intention to cause the consequences. For example, a mother jumps into a well along with her child in her arms to save herself and her child from the cruelty of her husband. The child dies but the mother survives. The act of the mother is culpable homicide. She might not have

intended to cause death of the child but, as a person having prudent mind, which law assumes every person to have, she ought to have known that jumping into the well along with the child was likely to cause the death of the child. She ought to have known as prudent member of the society that her act was likely to cause death even when she may not have intended to cause the death of the child.

Recklessness: Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire this state of risk of bringing about the unwished result. This state of mind is known as 'recklessness'. The words 'rash' and 'rashness' have also been used to indicate this same attitude.

Negligence: If anything is done without any advertence to the consequent event or result, the mental state in such situation signifies negligence. The event may be harmless or harmful; if harmful the question arises whether there is legal liability for it. In civil law (common law) it is decided by considering whether or not a reasonable man in the same circumstances would have realized the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. The word 'negligence', therefore, is used to denote blameworthy inadvertence. It should be recognized that at common law there is no criminal liability for harm thus caused by inadvertence. Strictly speaking, negligence may not be a form of *mens rea*. It is more in the nature of a legal fault. However, it is made punishable for a utilitarian purpose of hoping to improve people's standards of behaviour. Criminal liability for negligence is exceptional at common law; manslaughter appears to be the only common law crime, which may result from negligence. Crimes of negligence may be created by statute, and a statute may provide that it is a defence to charges brought under its provisions for the accused to prove that he was not negligent. Conversely, negligence with regard to some subsidiary element in the *actus reus* of a crime may deprive the accused of a statutory defence which would otherwise have been available to him.

Advertent negligence is commonly termed as wilful negligence or recklessness. In other words, inadvertent negligence may be distinguished as simple. In the former the harm done is foreseen as possible or probable but it is not willed. In the latter it is neither foreseen nor willed. In each case carelessness, i.e. to say indifference as to the consequences, is present; but in the former this indifference does not, while in the latter it does prevent these consequences from being foreseen. The physician who treats a patient improperly through

ignorance or forgetfulness is guilty of simple or inadvertent negligence; but if he does the same in order to save himself trouble, or by way of a scientific experiment with full recognition of the danger so incurred, his negligence is wilful. It may be important to state here that the wilful wrong doer is liable because he desires to do the harm; the negligent wrong doer is liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply: - perhaps you did not, but at all event you might have avoided it if you had sufficiently desire to do so; and you are held liable not because you desired the mischief, but because you were careless and indifferent whether it ensured or not. It is on this ground that negligence is treated as a form of *mens rea*, standing side by side with wrongful intention as a formal ground of responsibility.

Actus Reus: To constitute a crime the third element, which we have called *actus reus* or which Russell[1] has termed as "physical event", is necessary. Now what is this *actus reus*?[2] It is a physical result of human conduct. When criminal policy regards such a conduct as sufficiently harmful it is prohibited and the criminal policy provides a sanction or penalty for its commission. The *actus reus* may be defined in the words of Kenny to be "such result of human conduct as the law seeks to prevent."[3] Such human conduct may consist of acts of commission as well as acts of omission. Section 32 of our Penal Code lays down: "Words which refer to acts done extend also to illegal omissions."

It is, of course, necessary that the act done or omitted to be done must be an act forbidden or commanded by some statute law, otherwise, it may not constitute a crime. Suppose, an executioner hangs a condemned prisoner with the intention of hanging him. Here all the three elements obviously are present, yet he would not be committing a crime because he is acting in accordance with a law enjoining him to act. So also if a surgeon in the course of an operation, which he knew to be dangerous, with the best of his skill and care performs it and yet the death of the patient is caused, he would not be guilty of committing a crime because he had no *mens rea* to commit it.

As regards acts of omission which make a man criminally responsible, the rule is that no one would be held liable for the lawful consequences of his omission unless it is proved that he was under a legal obligation to act. In other words,

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1 Russell, *op. cit*, p. 27

2 It includes not only the result of active conduct (i.e. a deed), but also the result of inactivity.

3 Kenny, ***Outlines of Criminal Law*** (17th Ed.), p. 14.

some duty should have been imposed upon him by law, which he has omitted to discharge. Under the Penal Code, Section 43 lays down that the word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes a ground for a civil action; and a person is said to be "legally bound to do whatever it is illegal in him to omit." Therefore, an illegal omission would apply to omissions of everything which he is legally bound to do. These indicate problems of *actus reus* we have discussed in detail elsewhere. However, the two elements *actus reus* and *mens rea* are distinct elements of a crime. They must always be distinguished and must be present in order that a crime may be constituted. The mental element or *mens rea* in modern times means that the person's conduct must be voluntary and it must also be actuated by a guilty mind, while *actus reus* denotes the physical result of the conduct, namely, it should be a violation of some law, statutory or otherwise, prohibiting or commanding the conduct.

Injury to Human Being: The fourth element, as we have pointed out above, is an injury to another human being or to society at large. This injury to another human being should be illegally caused to any person in body, mind, reputation or property. Therefore, it becomes clear that the consequences of harmful conduct may not only cause a bodily harm to another person, it may cause harm to his mind or to his property or to his reputation. Sometimes, by a harmful conduct no injury is caused to another human being, yet the act may be held liable as a crime, because in such a case harm is caused to the society at large. All the public offences, especially offences against the state, e.g. treason, sedition, etc. are instances of such harms. They are treated to be very grave offences and punished very severely also.

We may state again that there are four essential elements that go to constitute a crime. First, the wrongdoer who must be a human being and must have the capacity to commit a crime, so that he may be a fit subject for the infliction of an appropriate punishment. Secondly, there should be an evil intent or *mens rea* on the part of such human being. This is also known as the subjective element of a crime. Thirdly, there should be an *actus reus,* i.e. an act committed or omitted in furtherance of such evil intent or *mens rea*. This may be called the objective element of a crime. Lastly, as a result of the conduct of the human being acting with an evil mind, an injury should have been caused to another human being or to the society at large. Such an injury should have been caused to any other person in body, mind, reputation or property. If all these elements

are present, generally, we would say that a crime has been constituted. However, in some cases we find that a crime is constituted, although there is no *mens rea* at all. These are known as cases of strict liability. Then again, in some cases a crime is constituted, although the *actus reus* has not consummated and no injury has resulted to any person. Such cases are known as inchoate crimes, like attempt, abetment or conspiracy. So also, a crime may be constituted where only the first two elements are present. In other words, when there is intention alone or even in some cases there may be an assembly alone of the persons without any intention at all. These are exceptional cases of very serious crimes which are taken notice of by the state in the larger interests of the peace and tranquillity of the society.

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State of Maharashtra v. *Mayer Hans George*

(1965) 1 SCR 123: AIR 1965 SC 722

K. SUBBA RAO, J. - I regret my inability to agree. This appeal raises the question of the scope of the ban imposed by the Central Government and the Central Board of Revenue in exercise of the powers conferred on them under Section 8 of the Foreign Exchange Regulation Act, 1947 against persons transporting prohibited articles through India.

8. In exercise of the powers conferred under Section 8 of the Act the Government of India issued on August 25, 1948 a notification that gold and gold articles, among others, should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same date the Reserve Bank of India issued a notification giving a general permission for bringing or sending any such gold provided it was on through transit to a place outside India. On November 24, 1962, the Reserve Bank of India published a notification dated November 8, 1962 in supersession of its earlier notification placing further restrictions on the transit of such gold to a place outside the territory of India, one of them being that such gold should be declared in the "Manifest" for transit in the "same bottom cargo" or "transhipment cargo". The respondent left Zurich by a Swiss aeroplane on November 27, 1962, which touched Santa Cruz Airport at 6.05 a.m. on the next day. The Customs Officers, on the basis of previous information, searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was a passenger bound for Manila. The other facts are not necessary for this appeal. Till November 24, 1962 there was a general permission for a person to bring or send gold into India, if it was on through transit to a place outside the territory of India; but from that date it could not be so done except on the condition that it was declared in the "Manifest" for transit as "same bottom cargo" or "transhipment cargo". When the respondent boarded the Swiss plane at Zurich on November 27, 1962, he could not have had knowledge of the fact that the said condition had been imposed on the general permission given by the earlier notification. The gold was carried on the person of the respondent and he was only sitting in the plane after it touched the Santa Cruz Airport. The respondent was prosecuted for importing gold into India under Section 8(1) of the Act, read with Section 23(1-A) thereof, and under Section 167(8)(*i*) of the Sea Customs Act. The learned Presidency Magistrate found the accused "guilty" on the two counts and sentenced him to rigorous imprisonment for one year. On appeal the High Court of Bombay held that the second proviso to the relevant notification issued by the Central Government did not apply to a person carrying gold with him on his body, that even if it applied, the *mens rea* being a necessary ingredient of the offence, the respondent who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. On those findings, it held that the respondent was not guilty under any of the aforesaid sections. In the result the conviction made by the Presidency Magistrate was set aside. This appeal has been preferred by special leave against the said order of the High Court.

9. Learned Solicitor-General, appearing for the State of Maharashtra, contends that the Act was enacted to prevent smuggling of gold in the interests of the economic stability of the

country and, therefore, in construing the relevant provisions of such an Act there is no scope for applying the presumption of common law that *mens rea* is a necessary ingredient of the offence. The object of the statute and the mandatory terms of the relevant provisions, the argument proceeds, rebut any such presumption and indicate that *mens rea* is not a necessary ingredient of the offence. He further contents that on a reasonable construction of the second proviso of the notification dated November 8, 1962 issued by the Board of Revenue, it should be held that the general permission for bringing gold into India is subject to the condition laid down in the second proviso and that, as in the present case the gold was not disclosed in the Manifest, the respondent contravened the terms thereof and was, therefore liable to be convicted under the aforesaid sections of the Foreign Exchange Act. No argument was advanced before us under Section 168(8)(*i*) of the Sea Customs Act and, therefore, nothing need be said about that section.

10. Learned counsel for the respondent sought to sustain the acquittal of his client practically on the grounds which found favour with the High Court. I shall consider in detail his argument at the appropriate places of the judgment.

11. The first question turns upon the relevant provisions of the Act and the notifications issued thereunder. At the outset it would be convenient to read the relevant parts of the said provisions and the notifications, for the answer to the question raised depends upon them.

> 8. (1) The Central Government may, by notification in the Official Gazette, order that subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold....
> *Explanation*.—The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be bringing, or as the case may be, sending into India of that article for the purpose of this section.

In exercise of the power conferred by the said section on the Central Government, it had issued the following notification dated August 25, 1948 (as amended upto July 31, 1958):

> In exercise of the powers conferred by sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 and in supersession of the Notification of the Government of India ... the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India:-
> (*a*) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not;....

The Reserve Bank of India issued a notification dated August 25, 1948 giving a general permission in the following terms:

> The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided that the gold or silver (*a*) is on through transit to a place which is outside both (*i*) the territory of India and (*ii*) the Portuguese Territories which are adjacent to or surrounded by the territory of India and (*b*) is not removed from the carrying ship or aircraft, except for the purpose of transhipment.

On November 8, 1962, in supersession of the said notification the Reserve Bank of India issued the following notification which was published in the Official Gazette on November 24, 1962:

> (T)he Reserve Bank of India gives general permission to the bringing or sending of any of the following articles, namely,
> (*a*) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not, into any port or place in India when such articles is on through transit to a place which is outside the territory of India. Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment;
>
> Provided further that it is declared in the manifest for transit as same bottom cargo or transhipment cargo.

The combined effect of the terms of the section and the notifications may be stated thus: No gold can be brought in or sent to India though it is on through transit to a place which is outside India except with the general or special permission of the Reserve Bank of India. Till November 24, 1962, under the general permission given by the Reserve Bank of India such gold could be brought in or sent to India if it was not removed from the ship or aircraft except for the purpose of transhipment. But from that date another condition was imposed thereon, namely, that such gold shall be declared in the manifest transit as "same bottom cargo" or "transhipment cargo."

12. Pausing here, it will be useful to notice the meaning of some of the technical words used in the second proviso to the notification. The object of maintaining a transit manifest for cargo, as explained by the High Court, is twofold, namely, "to keep a record of goods delivered into the custody of the carrier for safe carriage and to enable the Customs Authorities to check and verify the dutiable goods which arrive by a particular fight". "Cargo" is a shipload or the lading of a ship. No statutory or accepted definition of the word "cargo" has been placed before us. While the appellant contends that all the goods carried in a ship or plane is cargo, the respondents counsel argues that nothing is cargo unless it is included in the manifest. But what should be included and what need not be included in the manifest is not made clear. It is said that the expressions "same bottom cargo" and "transit cargo" throw some light on the meaning of the word "cargo". Article 606 of the Chapter on "Shipping and Navigation" in **Halsbury's *Laws of England***, 3rd Edn., Vol. 35, at p. 426, brings out the distinction between the two types of cargo. If the cargo is to be carried to its destination by the same conveyance throughout the voyage or journey it is described as "same bottom cargo." On the other hand, if the cargo is to be transhipped from one conveyance to another during the course of transit, it is called "transhipment cargo." This distinction also does not throw any light on the meaning of the word "cargo". If the expression "cargo" takes in all the goods carried in the plane, whether it is carried under the personal care of the passenger or entrusted to the care of the officer in charge of the cargo, both the categories of cargo can squarely fall under the said two heads. Does the word "manifest" throw any light? Inspector Darine Bejan Bhappu says in his evidence that manifest for transit discloses only such goods as are unaccompanied baggage but on the same flight and that "accompanied baggage is never manifested as Cargo Manifest". In the absence of any material or evidence to the contrary, this statement must be accepted as a correct representation of the actual practice obtaining in such matters. But that practice does not prevent the imposition of a statutory obligation to include accompanied baggage also as an item in the manifest if a

passenger seeks to take advantage of the general permission given thereunder. I cannot see any inherent impossibility implicit in the expression "cargo" compelling me to exclude an accompanied baggage from the said expression.

13. Now let me look at the second proviso of the notification dated November 8, 1962. Under Section 8 of the Act there is ban against bringing or sending into India gold. The notification lifts the ban to some extent. It says that a person can bring into any port or place in India gold when the same is on through transit to a place which is outside the territory of India, provided that it is declared in the manifest for transit as "same bottom cargo or transhipment cargo". It is, therefore, not an absolute permission but one conditioned by the said proviso. If the permission is sought to be availed of, the condition should be complied with. It is a condition precedent for availing of the permission.

14. Learned counsel for the respondent contends that the said construction of the proviso would preclude a person from carrying small articles of gold on his person if such article could not be declared in the manifest for transit as "same bottom cargo" or "transhipment cargo" and that could not have been the intention of the Board of Revenue. On that basis, the argument proceeds, the second proviso should be made to apply only to such cargo to which the said proviso applies and the general permission to bring gold into India would apply to all other gold not covered by the second proviso. This argument, if accepted, would enable a passenger to circumvent the proviso by carrying gold on his body by diverse methods. The present case illustrates how such a construction can defeat the purpose of the Act itself. I cannot accept such a construction unless the terms of the notification compel me to do so. I do not see any such compulsion. The alternative construction for which the appellant contends no doubt prevents a passenger from carrying with him small articles of gold. The learned Solicitor-General relies upon certain rules permitting a passenger to bring into India on his person small articles of gold, but *ex facie* those rules do not appear to apply to a person passing through India to a foreign country. No doubt to have international goodwill the appropriate authority may be well advised to give permission for such small articles of gold or any other article for being carried by a person with him on his way through India to foreign countries. But for one reason or other, the general permission in express terms says that gold shall be declared in the manifest and I do not see, nor any provision of law has been placed before us, why gold carried on a person cannot be declared in the manifest if that person seeks to avail himself of the permission. Though I appreciate the inconvenience and irritation that will be caused to passengers *bonafide* passing through our country to foreign countries for honest purposes, I cannot see my way to interpret the second proviso in such a way as to defeat its purpose. I, therefore, hold that on a fair construction of the notification dated November 8, 1962 that the general permission can be taken advantage of only by a person passing through India to a foreign country if he declares the gold in his possession in the manifest for transit as "same bottom cargo" or "transhipment cargo".

15. The next argument is that *mens rea* is an essential ingredient of the offence under Section 8 of the Act, read with Section 23(l-A)(*a*) thereof. Under Section 8 no person shall, except with the general or special permission of the Reserve Bank of India, bring or send to India any gold. Under the notification dated November 8, 1962, and published on November 24, 1962, as interpreted by me, such gold to earn the permission shall be declared in the

manifest. The section, read with the said notification, prohibits bringing or sending to India gold intended to be taken out of India unless it is declared in the manifest. If any person brings into or sends to India any gold without declaring it in such manifest, he will be doing an act in contravention of Section 8 of the Act read with the notification and, therefore, he will be contravening he provisions of the Act. Under Section 23(l-A)(*a*) of the Act he will be liable to punishment of imprisonment which may extend to two years or with fine or with both. The question is whether the intention of the legislature is to punish persons who break the said law without a guilty mind. The doctrine of *mens rea* in the context of statutory crimes has been the subject-matter of many decisions in England as well as in our country. I shall briefly consider some of the important standard textbooks and decisions cited at the Bar to ascertain its exact scope.

16. In ***Russell on Crime***, 11th Edn., Vol. 1, it is stated at p. 64:

> ... there is a presumption that in any statutory crime the common law mental element, *mens rea*, is an essential ingredient.

On the question how to rebut this presumption, the learned author points out that the policy of the courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In **Halsbury's *Laws of England***, 3rd Edn., Vol. 10, in para 508, at p. 273, the following passage appears:

> A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, willfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea,* and in such a case in order to determine whether or not *mens rea,* is an essential element of the offence it is necessary to look at the objects and terms of the statute.

This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question whether *mens rea,* is an ingredient of the offence or not: it depends upon the object and the terms of the statute. So too, Archbold in his book on ***Criminal Pleading, Evidence and Practice***, 35th Edn., says much to the same effect at p. 48 thus:

> It has always been a principle of the common law that *mens rea,* is an essential element in the commission of any criminal offence against the common law.... In the case of statutory offences it depends on the effect of the statute.... There is a presumption that *mens rea,* is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals.

The leading case on the subject is ***Sherras* v. *De Rutzen*** [(1895) 1 QB 918, 921]. Section 16(2) of the Licensing Act, 1872, prohibited a licenced victualler from supplying liquor to a police constable while on duty. It was held that that section did not apply where a licenced victualler *bona fide* believed that the police officer was off duty. Wright, J., observed:

> There is a presumption that *mens rea,* an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.

This sums up the statement of the law that has been practically adopted in later decisions. The Privy Council in ***Jacob Bruhn* v. *King on the Prosecution of the Opium Farmer*** [LR (1909) AC 317, 324] construed Section 73 of the Straits Settlements Opium Ordinance, 1906. Section 73 of the said Ordinance stated that if any ship was used for importation, landing, removal, carriage or conveyance of any opium or chandu contrary to the provisions of the said Ordinance or of the rules made thereunder, the master and owner thereof would be liable to a fine. The section also laid down the rule of evidence that if a particular quantity of opium was found in the ship that was evidence that the ship had been used for importation of opium, unless it was proved to the satisfaction of the court that every reasonable precaution had been taken to prevent such user of such ship and that none of the officers, their servants or the crew or any persons employed on board the ship, were implicated therein. The said provisions are very clear; the offence is defined, the relevant evidence is described and the burden of proof is placed upon the accused. In the context of that section the Judicial Committee observed:

> By this Ordinance every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he prima facie commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is prima facie a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning.

It would be seen from the aforesaid observation that in that case *mens rea,* was not really excluded but the burden of proof to negative *mens rea,* was placed upon the accused. In ***Pearks' Dairies Ltd.* v. *Tottenham Food Control Committee*** [(1919) 88 LJ KB 623, 626] the Court of Appeal considered the scope of Regulations 3 and 6 of the Margarine (Maximum Prices) Order, 1917. The appellants' assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer at the price of 1 sh. per Ib. giving only 14½ozs. by weight instead of 16 ozs. The appellants were prosecuted for selling margarine at a price exceeding the maximum price fixed and one of the contentions raised on behalf of the accused was that *mens rea,* on the part of the appellants was not an essential element of the offence. Lord Coleridge, J., cited with approval the following passage of Channell, J., in ***Pearks, Gunston & Tee, Ltd.* v. *Ward*** [(1902) 71 LJ KB 656]:

> But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment, of a fine; and the reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea,* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely.

This decision states the same principle in a different form. It also places emphasis on the terms and the object of the statute in the context of the question whether *mens rea,* is excluded

or not. The decision in ***Rex* v. *Jacobs*** [(1944) KB 417] arose out of an agreement to sell price-controlled goods at excess price. The defence was that the accused was ignorant of the proper price. The Court of Criminal Appeal held that in the summing up the direction given by the Judge to the jury that it was not necessary that the prosecution should prove that the appellants knew what the permitted price was but that they need only show in fact a sale at an excessive price had taken place, was correct in law. This only illustrates that on a construction of the particular statute, having regard to the object of the statute and its terms, the Court may hold that *mens rea,* is not a necessary ingredient of the offence. In ***Brend* v. *Wood*** [(1946) 62 The Times LR 462, 463] dealing with an emergency legislation relating to fuel rationing, Goddard, C.J., observed:

> There are statutes and regulations in which Parliament has been not to create offences and make people responsible before criminal courts although there is an absence of *mens rea,* but it is certainly not the Court's duty to be acute to find that *mens rea,* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea,* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

This caution administered by an eminent and experienced Judge in the matter of construing such statutes cannot easily be ignored. The Judicial Committee in ***Srinivas Mall Bairoloya* v. *King-Emperor*** [(1947) ILR 26 Pat 460, 469 (PC)] was dealing with a case in which one of the appellants was charged with an offence under the rules made by virtue of the Defence of India Act, 1939, of selling salt at prices exceeding those prescribed under the rules, though the sales were made without the appellant's knowledge by one of his servants. Lord Parcq, speaking for the Board, approved the view expressed by Goddard, C.J., in ***Brend* v. *Wood*** and observed:

> Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said: 'It is in my opinion the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea,* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.'

The acceptance of the principle by the Judicial Committee that *mens rea,* is a constituent part of a crime unless the statute clearly or by necessary implication excludes the same, and the application of the same to a welfare measure is an indication that the Court shall not be astute in construing a statute to ignore *mens rea,* on a slippery ground of a welfare measure unless the statute compels it to do so. Indeed, in that case the Judicial Committee refused to accept the argument that where there is an absolute prohibition, no question of *mens rea,* arises. The Privy Council again in ***Lim Chin Aik* v. *Queen*** [(1963) AC 160, 174, 175] reviewed the entire law on the question in an illuminating judgment and approached the question, if I may say so, from a correct perspective. By Section 6 of the Immigration Ordinance, 1952, of the State of Singapore, "It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation or having entered the colony from the Federation to remain in the Colony if such person has been prohibited by order made under Section 9 of this Ordinance from entering the colony" and Section 9, in the case of an order directed to a single individual,

contained no provision for publishing the order or for otherwise bringing it to the attention of the person named. The Minister made an order prohibiting the appellant from entering the colony and forwarded it to the Immigration officer. There was no evidence that the order had in fact come to the notice or attention of the appellant. He was prosecuted for contravening Section 6(2) of the Ordinance. Lord Evershed, speaking for the Board, reaffirmed the formulations cited from the judgment of Wright, J., and accepted by Lord de Parcq in ***Srinivas Mul Bairoliya*** case. On a review of the case-law on the subject and the principles enunciated therein, the Judicial Committee came to the following conclusion:

> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

The same idea was repeated thus:

> Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, Their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.

Dealing with the facts of the case before it, the Privy Council proceeded to illustrate the principle thus:

> But Mr. Le Quesne was unable to point to anything that the appellant could possibly have done so as to ensure that he complied with the regulations. It was not, for example, suggested that it would be practicable for him to make continuous inquiry to see whether an order had been made against him. Clearly one of the objects of the Ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not.

On that reasoning the Judicial Committee held that the accused was not guilty of the offence with which he was charged. This decision adds a new dimension to the rule of construction of a statute in the context of *mens rea,* accepted by earlier decisions. While it accepts the rule that for the purpose of ascertaining whether a statute excludes *mens rea* or not, the object of the statute and its wording must be weighed, it lays down that *mens rea* cannot be excluded unless the person or persons aimed at by the prohibition are in a position to observe the law or to promote the observance of the law. We shall revert to this decision at a later stage in a different context. This Court in ***Rahula Hariparasada Rao*** **v.** ***State*** [(1951) SCR 322] speaking through Fazl Ali, J., accepted the observations made by the Lord Chief Justice of England in ***Brend*** **v.** ***Wood***. The decision of this Court in ***Indo-China Steam Navigation Co. Ltd.*** **v.** ***Jasjit Singh, Additional Collector of Customs, Calcutta*** [Civil Appeal No 770 of 1962 (judgement delivered on 3-2-64)] is strongly relied upon by the appellant in support of the contention that *mens rea,*

is out of place in construing statutes similar to that under inquiry now. There, this Court was concerned with the interpretation of Section 52-A of the Sea Customs Act, 1878. The Indo-China Steam Navigation Co. Ltd., which carries on the business of carriage of goods and passengers by sea, owns a fleet of ships, and has been carrying on its business for over 80 years. One of the routes plied by its ships is the Calcutta-Japan-Calcutta route. The vessel *Eastern Saga* arrived at Calcutta on October 29, 1957. On a search it was found that a hole was covered with a piece of wood and over painted and when the hole was opened a large quantity of gold in bars was discovered. After following the prescribed procedure the Customs Authorities made an order confiscating the vessel in addition to imposing other penalties. One of the contentions raised was that Section 52-A of the Sea Customs Act the infringement whereof was the occasion for the confiscation could not be invoked unless *mens rea,* was established. Under that section no vessel constructed, adapted, altered or fitted for the purpose of concealing goods shall enter, or be within, the limits of any port in India, or the Indian customs waters. This Court in construing the scheme and object of the Sea Customs Act came to the conclusion that *mens rea,* was not a necessary ingredient of the offence, as, if that was so, the statute would become a dead-letter. That decision was given on the basis of the clear object of the statute and on a construction of the provisions of that statute which implemented the said object. It does not help us in construing the relevant provisions of the Foreign Exchange Regulation Act.

17. The Indian decisions also pursued the same line. A Division Bench of the Bombay High Court in ***Emperor* v. *Isak Solomon Macmull*** [(1948) 50 Bom LR 190, 194] in the context of the Motor Spirit Rationing Order, 1941, made under the Essential Supplies (Temporary Powers) Act, 1946, held that a master is not vicariously liable, in absence of *mens rea,* for an offence committed by his servant for selling petrol in absence of requisite coupons and at a rate in excess of the controlled rate. Chagla, C.J., speaking for the Division Bench, after considering the relevant English and Indian decisions, observed:

> It is not suggested that even in the class of cases where the offence is not a minor offence or not quasi-criminal that the legislature cannot introduce the principle of vicarious liability and make the master liable for the acts of his servant although the master has no *mens rea,* and was morally innocent. But the Courts must be reluctant to come to such a conclusion unless the clear words of the statute compel them to do so or they are driven to that conclusion by necessary implication.

So too, a Division Bench of the Mysore High Court in ***State of Coorg* v. *P.K. Assu*** [ILR (1955) Mysore 516] held that a driver and a cleaner of a lorry which carried bags of charcoal and also contained bags of paddy and rice underneath without permit as required by a notification issued under the Essential Supplies (Temporary Powers) Act, 1946, were not guilty of any offence in the absence of their knowledge that the lorry contained food grains. To the same effect a Division Bench of the Allahabad High Court in ***State* v. *Sheo Prasad*** [AIR 1956 All 610] held that a master was not liable for his servant's act in carrying oilseeds in contravention of the order made under the Essential Supplies (Temporary Powers) Act, 1946, on the ground that he had not the guilty mind. In the same manner a Division Bench of the Calcutta High Court in ***C.T. Prim* v. *State*** [AIR 1961 Cal 177] accepted as settled law that unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of

the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind.

18. The law on the subject relevant to the present enquiry may briefly be stated as follows. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea,* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability, helps him to assist the State in the enforcement of the law: can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea,* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea that* will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

19. What is the object of the Act? The object of the Act and the notification issued thereunder is to prevent smuggling of gold and to conserve foreign exchange. Doubtless it is a laudable object. The Act and the notification were conceived and enacted in public interest; but that in itself is not, as I have indicated, decisive of the legislative intention.

20. The terms of the section and those of the relevant notification issued thereunder do not expressly exclude *mens rea*. Can we say that *mens rea,* is excluded by necessary implication? Section 8 does not contain an absolute prohibition against bringing or sending into India any gold. It in effect confers a power on the Reserve Bank of India to regulate the import by giving general or special permission; nor the notification dated August 25, 1948, issued by the Government embodies any such absolute prohibition. It again, in substance, leaves the regulation of import of gold to the Reserve Bank of India; in its turn the Reserve Bank of India by a notification of the same date permitted persons to transit gold to a place which is outside the territory of India and the Portuguese territories without any permission. Even the impugned notification does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India. It permits such import for such through transit, but only subject to conditions. It is, therefore, manifest that the law of India as embodied in the Act under Section 8 and in the notification issued thereunder does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India; and indeed it permits such bringing of gold but subject to certain conditions. The legislature, therefore, did not think that public interest would irreparably suffer if such transit was permitted, but it was satisfied that with some regulation such interest could be protected. The

law does not become nugatory if element of *mens rea,* was read into it, for there would still be persons who would be bringing into India gold with the knowledge that they would be breaking the law. In such circumstances no question of exclusion of *mens rea,* by necessary implication can arise.

21. If a person was held to have committed an offence in breach of the provision of Section 8 of the Act and the notification issued thereunder without any knowledge on his part that there was any such notification or that he was bringing any gold at all, many innocent persons would become victims of law. An aeroplane in which a person with gold on his body is travelling may have a forced landing in India, or an enemy of a passenger may surreptitiously and maliciously put some gold trinket in his pocket without his knowledge so as to bring him into trouble; a person may be carrying gold without knowledge or even without the possibility of knowing that a law prohibiting taking of gold through India is in existence. All of them, if the interpretation suggested by the learned Solicitor-General be accepted, will have to be convicted and they might be put in jail for a period extending to 2 years. Such an interpretation is neither supported by the provisions of the Act nor is necessary to implement its object. That apart, by imposing such a strict liability as to catch innocent persons in the net of crime, the Act and the notification issued thereunder cannot conceivably enable such a class of persons to assist the implementation of the law: they will be helpless victims of law. Having regard to the object of the Act, I think no person shall be held to be guilty of contravening the provisions of Section 8 of the Act, read with the notification dated November 8, 1962 issued thereunder, unless he has knowingly brought into India gold without complying with the terms of the proviso to the notification.

22. Even so it is contended that the notification dated November 8, 1962, is law and that the maxim "ignorance of law is no defence" applies to the breach of the said law. To state it differently, the argument is that even the mental condition of knowledge on the part of a person is imported into the notification; the said knowledge is imputed to him by the force of the said maxim. Assuming that the notification dated November 8, 1962, is a delegated legislation, I find it difficult to invoke that maxim as the statute empowering the Reserve Bank of India to give the permission, or the rules made thereunder do not prescribe the mode of publication of the notification. Indeed a similar question arose before the Privy Council in ***Lim Chin Aik* v. *Queen*** and a similar argument was advanced before it; but the Board rejected it. I have already dealt with this decision in another context. There the Minister under the powers conferred on him by Section 9 of the Immigration Ordinance, 1952, issued an order prohibiting the appellant therein from entering Singapore. He was prosecuted for disobeying that order. Section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the knowledge of the person named. The Crown invoked the precept that ignorance of the law was no excuse. In rejecting the contention of the Crown, Lord Evershed, speaking for the Board observed at p. 171 thus:

> Their Lordships are unable to accept the contention. In their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in Section 3(2) of

> the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is.

Here, as there, it is conceded that there is no provision providing for the publication in any form of an order of the kind made by the Reserve Bank of India imposing conditions on the bringing of gold into India. The fact that the Reserve Bank of India published the order in the Official Gazette does not affect the question for it need not have done so under any express provisions of any statute or rules made thereunder. In such cases the maxim cannot be invoked and the prosecution has to bring home to the accused that he had knowledge or could have had knowledge if he was not negligent or had made proper enquiries before he could be found guilty of infringing the law. In this case the said notification was published on November 24, 1962, and the accused left Zurich on November 27, 1962, and it was not seriously contended that the accused had or could have had with diligence the knowledge of the contents of the said notification before he brought gold into India. I, therefore, hold that the respondent was not guilty of the offence under Section 23(1-A) of the Act as it has not been established that he had with knowledge of the contents of the said notification brought gold into India on his way to Manila and, therefore, he had not committed any offence under the said section. I agree with the High Court in its conclusion though for different reasons.

23. Though the facts established in the case stamp the respondent as an experienced smuggler of gold and though I am satisfied that the Customs Authorities *bona fide* and with diligence performed their difficult duties, I have reluctantly come to the conclusion that the accused has not committed any offence under Section 23(1-A) of the Act. In the result, the appeal fails and is dismissed.

N. R. AYYANGAR, J. - This appeal by special leave is directed against the judgment and order of the High Court of Bombay setting aside the conviction of the respondent under Section 8(1) of the Foreign Exchange Regulation Act, 1947 read with a notification of the Reserve Bank of India dated November 8, 1962 and directing his acquittal. The appeal was heard by us at the end of April last and on the 8th May which was the last working day of the Court before it adjourned for the summer vacation, the Court pronounced the following order:

> By majority, the appeal is allowed and the conviction of the respondent is restored but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course.

25. We now proceed to state our reasons. The material facts of the case are not in controversy. The respondent who is a German national by birth is stated to be a sailor by profession. In the statement that he made to the Customs Authorities, when he was apprehended the respondent stated that some person not named by him met him in Hamburg and engaged him on "certain terms of remuneration, to clandestinely transport gold from Geneva to places in the Far East. His first assignment was stated by him to be to fly to Tokyo wearing a jacket which concealed in its specially designed pockets 34 bars of gold each weighing a kilo. He claimed he had accomplished this assignment and that he handed over the gold he carried to the person who contacted him at Tokyo. From there he returned to Geneva where he was paid his agreed remuneration. He made other trips, subsequently being engaged in like adventures in all of which he stated he had succeeded, each time carrying 34 kilos of gold bars which on every

occasion was carried concealed in a jacket which he wore, but we are now concerned with the one which he undertook at the instance of this international gang of gold smugglers carrying, similarly, 34 kilo bars of gold concealed in a jacket which he wore on his person. This trip started at Zurich on November 27, 1962 and according to the respondent his destination was Manila where he was to deliver the gold to a contact there. The plane arrived in Bombay on the morning of the 28th. The Customs Authorities who had evidently advance information of gold being attempted to be smuggled by the respondent travelling by that plane, first examined the manifest of the aircraft to see if any gold had been consigned by any passenger. Not finding any entry there, after ascertaining that the respondent had not come out of the plane as usual to the airport lounge, entered the plane and found him there seated.

They then asked him if he had any gold with him. The answer of the respondent was "what gold" with a shrug indicating that he did not have any. The Customs Inspector thereupon felt the respondent's back and shoulders and found that he had some metal blocks on his person. He was then asked to come out of the plane and his baggage and person were searched. On removing the jacket he wore it was found to have 28 specially made compartments 9 of which were empty and from the remaining 19, 34 bars of gold each weighing approximately one kilo were recovered. The respondent, when questioned, disclaimed ownership of the gold and stated that he had no interest in these goods and gave the story of his several trips which we have narrated earlier. It was common ground that the gold which the respondent carried was not entered in the manifest of the aircraft or other documents carried by it.

26. The respondent was thereafter prosecuted and charged with having committed an offence under Section 8(1) of the Act and also of certain provisions of the Sea Customs Act, in the Court of the Presidency Magistrate, Bombay. The Presidency Magistrate, Bombay took the complaint on file. The facts stated earlier were not in dispute but the point raised by the respondent before the Magistrate was one of law based on his having been ignorant of the law prohibiting the carrying of the gold in the manner that he did. In other words, the plea was that *mens rea* was an ingredient of the offence with which he was charged and as it was not disputed by the prosecution that he was not actually aware of the notification of the Reserve Bank of India which rendered the carriage of gold in the manner that he did an offence, he could not be held guilty. The learned Magistrate rejected this defence and convicted the respondent and sentenced him to imprisonment for one year. On appeal by the respondent the learned Judges of the High Court have allowed the appeal and acquitted the respondent upholding the legal defence which he raised. It is the correctness of this conclusion that calls for consideration in this appeal.

27. Before considering the arguments advanced by either side before us it would be necessary to set out the legal provisions on the basis of which this appeal has to be decided. The Foreign Exchange Regulation Act, 1947 was enacted in order to conserve foreign exchange, the conservation of which is of the utmost essentiality for the economic survival and advance of every country, and very much more so in the case of a developing country like India. Section 8 of the Act enacts the restrictions on the import and export *inter alia* of bullion. This section enacts, to read only that portion which relates to the import with which this appeal is concerned:

8. (1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any prescribed, bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign.

Explanation.—The bringing or sending into any port or place in India, of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing or as the case may be, sending into India of that article for the purposes of this section.

Section 8 has to be read in conjunction with Section 23 which imposes penalties on persons contravening the provisions of the Act. Sub-section (1) penalises the contravention of the provisions of certain named sections of the Act which do not include Section 8, and this is followed by sub-section (1-A) which is residuary and is directly relevant in the present context and it reads:

23. (1-A) whoever contravenes—

(*a*) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and Section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(*b*) any direction or order made under Section 19 shall, upon conviction by a Court be punishable with fine which may extend to two thousand rupees.

These have to be read in conjunction with the rule as to onus of proof laid down in Section 24(1) which enacts:

24. (1) Where any person is prosecuted or proceeded against for contravening any provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

28. Very soon after the enactment of the Act the Central Government took action under Section 8(1) and by a notification published in the Official Gazette dated August 25, 1948 the Central Government directed that "except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India any gold bullion", to refer only to the item relevant in the present context. The Reserve Bank by a notification of even date (August 25, 1948) granted a general permission in these terms:

The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any gold or any such silver by sea or air into any port in India:

Provided that the gold or silver

(a) is on through transit to a place which is outside both

(i) the territory of India.

(ii) The Portuguese territories which are adjacent to or surrounded by the territory of India and

(b) is not removed from the carrying ship or aircraft except for the purpose of transhipment.

On November 8, 1962, however, the Reserve Bank of India in supersession of the notification just now read, published a notification (and this is the one which was in force at the date relevant

to this case) giving general permission to the bringing or sending of gold, gold-coin etc.into any port or place in India when such article is on through transit to a place which is outside the territory of India:

> Provided that such articles if not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment:
> Provided further that it is declared in the manifest for transit as same bottom cargo or transhipment cargo.

This notification was published in the Gazette of India on November 24, 1962.

29. It was not disputed by Mr. Sorabjee — learned counsel for the respondent, subject to an argument based on the construction of the newly added 2nd proviso to which we shall refer later, that if the second notification of the Reserve Bank restricting the range of the exemption applied to the respondent, he was clearly guilty of an offence under Section 8(1) of the Act read with the Explanation to the sub-section. On the other hand, it was not also disputed by the learned Solicitor-General for the appellant-State that if the exemption notification which applied to the present case was that contained in the notification of the Reserve Bank dated August 25, 1948 the respondent had not committed any offence since (*a*) he was a through passenger from Geneva to Manila as shown by the ticket which he had and the manifest of the aircraft, and besides, (*b*) he had not even got down from the plane.

30. Two principal questions have been raised by Mr. Sorabjee in support of the proposition that the notification dated November 8, 1962 restricting the scope of the permission or exemption granted by the Reserve Bank did not apply to the case. The first was that *mens rea* was an essential ingredient of an offence under Section 23(1-A) of the Act and that the prosecution had not established that the respondent knowingly contravened the law in relation to the carriage of the contraband article; (2) The second head of learned counsel's argument was that the notification dated November 8, 1962, being merely subordinate or delegated legislation, could be deemed to be in force not from the date of its issue or publication in the Gazette but only when it was brought to the notice of persons who would be affected by it and that as the same was published in the Gazette of India only on November 24, 1962 whereas the respondent left Zurich on the 27th November he could not possibly have had any knowledge there of the new restrictions imposed by the Indian authorities and that, in these circumstances, the respondent could not be held guilty of an offence under Section 8(1) or Section 23(1-A) of the Act. He also raised a subsidiary point that the notification of the Reserve Bank could not be attracted to the present case because the second proviso which made provision for a declaration in the manifest "for transit as bottom cargo or transhipment cargo" could only apply to gold handed over to the aircraft for being carried as cargo and was inapplicable to cases where the gold was carried on the person of a passenger.

31. We shall deal with these points in that order. First as to whether *mens rea* is an essential ingredient in respect of an offence under Section 23(1)(*a*) of the Act. The argument under this head was broadly as follows: It is a principle of the Common Law that *mens rea* is an essential element in the commission of any criminal offence against the Common Law. This presumption that *mens rea* is an essential ingredient of an offence equally applies to an offence created by statute, though the presumption is liable to be displaced by the words of the statute creating the offence, or by the subject-matter dealt with by it (Wright, J. in ***Sherras* v. *De Rutzen*** [(1895)1

QB 918)]. But unless the statute clearly or by fair implication rules out *mens rea,* a man should not be convicted unless he has a guilty mind. In other words, absolute liability is not to be presumed, but ought to be established, or the purpose of finding out if the presumption is displaced, reference has to be made to the language of the enactment, the object and subject-matter of the statute and the nature and character of the act sought to be punished. In this connection learned counsel for the respondent strongly relied on a decision of the Judicial Committee in ***Srinivas Mall Bairoliya* v. *King-Emperor***. The Board was, there, dealing with the correctness of a conviction under the Defence of India Rules, 1939 relating to the control of prices. The appellant before the Board was a dealer in wholesale who had employed a servant to whom he had entrusted the duty of allotting salt to retail dealers and nothing on the buyer's licence the quantity which the latter had bought and received all of which were required to be done under the rules. For the contravention by the servant of the Regulations for the sale of salt prescribed by the Defence of India Rules the appellant was prosecuted and convicted as being vicariously liable for the act of his servant in having made illegal exactions contrary to the Rules. The High Court took the view that even if the appellant had not been proved to have known the unlawful acts of his servant, he would still be liable on the ground that "where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant". On appeal to the Privy Council Lord Du Parcq who delivered the judgment of the Board dissented from this view of the High Court and stated:

> They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright, J. in ***Sherras* v. *De Rutzen***. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable with imprisonment for a term which may extend to three years.

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in ***Brend* v. *Wood*** [(1946) 110 JP 317]:

> It is ... of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.

32. Mr. Sorabjee is justified in referring us to these rules regarding presumption and construction and it may be pointed out that this Court has, in ***Ravula Hariprasada Rao* v. *State*** approved of this passage in the judgment of Lord Du Parcq and the principle of construction underlying it. We therefore agree that absolute liability is not to be lightly presumed but has to be clearly established. Besides, learned counsel for the respondent strongly urged that on this point the exposition by Lord Evershed in ***Lim Chin Aik* v. *Queen*** had clarified the principles applicable in this branch of the law, and that in the light of the criteria there laid down we should hold that on a proper construction of the relevant provisions of the Act, *mens rea* or a guilty mind must be held to be an essential ingredient of the offence and that as it was conceded by the prosecution in the present case that the respondent was not aware of the notification by the Reserve Bank of India dated the 8th November, he could not be held guilty of the offence. We might incidentally state that that decision was also relied on in connection with the second

of the submissions made to us as regards the time when delegated legislation could be deemed to come into operation, but to that aspect we shall advert later.

33. In order to appreciate the scope and effect of the decision and of the observations and reasoning to which we shall presently advert it is necessary to explain in some detail the facts involved in it. Section 6(2) of the Immigration Ordinance, 1952, of the State of Singapore enacted:

> 6. (2) It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation ... if such person has been prohibited by order made under Section 9 of this Ordinance from entering the colony.
>
> By sub-section (3) it was provided that:
> Any person who contravenes the provisions of sub-section (2) of this section shall be guilty of an offence against this ordinance.

Section 9 which is referred to in Section 6(2) read to quote the material words of sub-section (1):

> The minister may by order ... (1) prohibit either for a stated period or permanently the entry or re-entry into the colony of any person or class of persons.

Its sub-section (3) provided:

> 34. Every order made under sub-section (1) of this section shall unless it be otherwise provided in such order take effect and come into operation on the date on which it was made.

While provision was made by the succeeding portion of the sub-section for the publication in the Gazette of orders which related to a class of persons, there was no provision in the sub-section for the publication of an order in relation to named individuals or otherwise for bringing it to the attention of such persons. The appellant before the Privy Council had been charged with and convicted by the courts in Singapore of contravening Section 6(2) of the Ordinance by remaining in Singapore when by an order made by the Minister under Section 9(1) he had been, by name, prohibited from entering the island. At the trial there was no evidence from which it could be inferred that the order had in fact come to the notice or attention of the accused. On the other hand, the facts disclosed that he could not have known of the order. On appeal by the accused, the conviction was set aside by the Privy Council. The judgment of the Judicial Committee insofar as it was in favour of the appellant, was based on two lines of reasoning. The first was that in order to constitute a contravention of Section 6(2) of the Ordinance *mens rea* was essential. The second was that even if the order of the Minister under Section 9 were regarded as an exercise of legislative power, the maxim "ignorance of law is no excuse" could not apply because there was not, in Singapore, any provision for the publication, in any form, of an order of the kind made in the case or any other provision to enable a man, by appropriate enquiry, to find out what the law was.

34. Lord Evershed who delivered the judgment of the Board referred with approval to the formulation of the principle as regards *mens rea,* to be found in the judgment of Wright, J. in ***Sherras* v. *DeRutzen*** already referred to. His Lordship also accepted as correct the enunciation of the rule in ***Srinivas Mall Bairoliya* v. *King-Emperor*** in the passage we have extracted earlier. Referring next to the argument that where the statute was one for the regulation for the public

welfare of a particular activity it had frequently been inferred that strict liability was the object sought to be enforced by the legislature, it was pointed out:

> The presumptions that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with: When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea.

Reference was then made to legislation regulating sale of food and drink and he then proceeded to state:

> It is not enough merely to lable the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

35. As learned counsel has laid great stress on the above passages, it is necessary to analyse in some detail the provisions in the Singapore Ordinance in relation to which this approach was made and compare them with the case on hand. Let us first consider the frame of Section 6(2) of the Singapore Ordinance the relevant portion of which we have set out earlier. It prohibits the entry of non-citizens into the colony from the Federation, only in the event of that entry being banned by a general or particular order made by the Minister under Section 9. In other words, in the absence of an order made under Section 9, there was freedom of entry or rather absence of any legal prohibition against entry of persons from the Federation. In the light of this situation, the construction adopted was that persons who normally could lawfully enter the colony, had to be proved to have a guilty mind i.e. actual or constructive knowledge of the existence of the prohibition against their entry before they could be held to have violated the terms of Section 6(2). It is in this context that the reference to "the luckless victim" has to be understood. The position under Sections 8 and 23 of the Act is, if we say so, just the reverse. Apart from the public policy and other matters underlying the legislation before us to which we shall advert later, Section 8(1) of the Act empowers the Central Government to impose a complete ban on the bringing of any gold into India, the act of "bringing" being understood in the sense indicated in the Explanation. When such a ban is imposed, the import or the bringing of gold into India could be effected only subject to the general or special permission of the Reserve Bank. Added to this, and this is of some significance, there is the provision in Section 24(1) of the Act which throws on the accused in a prosecution the burden of proving that he had the requisite permission, emphasising as it were that in the absence of a factual and existent permission to which he can refer, his act would be a violation of the law. In pursuance of the provision in Section 8(1), Central Government published a notification on August 25, 1948 in which the terms of Section 8(1) regarding the necessity of permission of the Reserve Bank to bring gold into India were repeated. On the issue of this notification the position was that everyone who "brought" gold into India, in the sense of the Explanation to Section 8(1), was guilty of an offence, unless he was able to rely for his act on permission granted by the Reserve Bank. We therefore start with this: The bringing of gold into India is unlawful unless permitted

by the Reserve Bank, - unlike as under the Singapore Ordinance, where an entry was not unlawful unless it was prohibited by an order made by the Minister. In the circumstances, therefore, *mens rea,* which was held to be an essential ingredient of the offence of a contravention of a Minister's order under the Ordinance, cannot obviously be deduced in the context of the reverse position obtaining under the Act.

36. There was one further circumstance to which it is necessary to advert to appreciate the setting in which the question arose before the Privy Council. The charge against the appellant was that having entered Singapore on or about May 17, 1959 he remained there while being prohibited by an order of the Minister under Section 9 and thereby contravened Section 6(2) of the Immigration Ordinance. At the trial it was proved that the order of the Minister was made on May 28, 1959 i.e. over 10 days after the appellant had entered the colony. It was proved that the Minister's order which prohibited the appellant, who was named in it, from entering Singapore was received by the Deputy Assistant Controller of Immigration on the day on which it was made and it was retained by that official with himself. The question of the materiality of the knowledge of the accused of the order prohibiting him from entering the colony came up for consideration in such a context. The further question as to when the order would, in law, become effective, relates to the second of the submissions made to us by the respondent and will be considered later.

37. Reverting now to the question whether *mens rea* - in the sense of actual knowledge that the act done by the accused was contrary to the law - is requisite in respect of a contravention of Section 8(1), starting with an initial prescription in favour of the need for *mens rea*, we have to ascertain whether the presumption is overborne by the language of the enactment, read in the light of the objects and purposes of the Act, and particularly whether the enforcement of the law and the attainment of its purpose would not be rendered futile in the event of such an ingredient being considered necessary.

38. We shall therefore first address ourselves to the language of the relevant provisions. Section 23(1-A) of the Act which has already been set out merely refers to contravention of the provisions of the Act or the rule etc. so that it might be termed neutral in the present context, in that it neither refers to the state of the mind of the contravener by the use of the expression such as "wilfully, knowingly" etc., nor does it, in terms, create an absolute liability. Where the statute does not contain the word "knowingly", the first thing to do is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. When one turns to the main provision whose contravention is the subject of the penalty imposed by Section 23(1-A) viz. 8(1) in the present context, one reaches the conclusion that there is no scope for the invocation of the rule of *mens rea.* It lays an absolute embargo upon persons who without the special or general permission of the Reserve Bank and after satisfying the conditions, if any, prescribed by the Bank bring or send into India any gold etc., the absoluteness being emphasised, as we have already pointed out, by the terms of Section 24(1) of the Act. No doubt, the very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, for instance, if without the knowledge of the person a packet of gold was slipped into his pocket it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of Section 8(1). Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India

has to make a force landing in India — owing say to engine trouble. But if the bringing into India was a conscious act and was done *with the intention of bringing it into India* the mere "bringing" constitutes the offence and there is no other ingredient that is necessary in order to constitute a contravention of Section 8(1) than that conscious physical act of bringing. If then under Section 8(1) the conscious physical act of "bringing" constitutes the offence, Section 23(1-A) does not import any further condition for the imposition of liability than what is provided for in Section 8(1). On the language, therefore, of Section 8(1) read with Section 24(1) we are clearly of the opinion that there is no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in Section 23(1-A).

39. Next we have to have regard to the subject-matter of the legislation. For, as pointed out by Wills, J. in ***R.* v. *Tolson*** [23 QBD 168]:

> Although, prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong, or not.

The Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls; and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies. In this connection we consider it useful to refer to two decisions - the first a decision of the Privy Council and the other of the Court of Criminal Appeal. The decision of the Privy Council is that reported as ***Bruhn* v. *King*** [1909 AC 317] where the plea of *mens rea,* was raised as a defence to a prosecution for importation of opium in contravention of the Straits Settlements Opium Ordinance, 1960. Lord Atkinson speaking for the Board, referring to the plea as to *mens rea,* observed:

> The other point relied upon on behalf of the appellant was that there should be proof, express or implied, of a mens rea, in the accused person before he could be convicted of a criminal offence. But that depends upon the terms of the statute or ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons, or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, of that the prescribed conditions have been fulfilled, he will be adjudged guilty of the offence though in fact he knew nothing of the prohibition.

The criteria for the construction of statutes of the type we have before us laid down by the Court of Criminal Appeal in ***Regina* v. *St. Margarets Trust Ltd***. [(1958) 1 WLR 522] is perhaps even nearer to the point. The offence with which the appellants were there charged was a violation of the Hire Purchase and Credit Sale Agreements (Control) Order, 1956 which, having been enacted to effectuate a credit-squeeze, as being necessary for the maintenance of British economy, required by the rules made under it that every Hire Purchase agreement should state the price of the article and fixed the maximum proportion thereof which a hirer might be paid by a Financing Company. The appellant Company advanced to the hirer of a motor car more

than the permissible percentage but did so as it was misled by the company which sold the motor car as regards the price it charged to the customer. The plea raised in defence was that the Finance Company was unaware of the true price and that not having guilty knowledge, they could not be convicted of the offence. Donovan, J. who spoke for the Court said:

> The language of Article 1 of the Order expressly prohibits what was done by St. Margarets Trust Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea, should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea, is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption.

The learned Judge then referred to the various decisions in which the question as to when the Court would hold the liability to be absolute and proceeded:

> The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margarets Trust Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that Article 1 of the Order should receive a literal construction, and that the ruling of Diplock, J. was correct.
>
> It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases.

40. We consider these observations apposite to the construction of the provision of the Act now before us.

41. This question as to when the presumption as to the necessity for *mens rea* is overborne has received elaborate consideration at the hands of this Court when the question of the construction of Section 52-A of the Sea Customs Act came up for consideration in ***Indo-China Steam Navigation Co. Ltd.*** **v.** ***Jasjit Singh, Addl. Collector of Customs, Calcutta etc.*** Speaking for the Court, Gajendragadkar, C.J. said:

> The intention of the legislature in providing for the prohibition prescribed by Section 52-A is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more

than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity.

42. This passage, in our opinion, is very apt in the present context and the offences created by Sections 8 and 23(1-A) of the Act. In our opinion, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into Section 8(1) or Section 23(1-A) of the Act qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

* * * * *

State of Madhya Pradesh v. *Narayan Singh*

(1989) 3 SCC 596

NATARAJAN, J. — In both the appeals, by special leave, a common question of law is involved and hence they were heard together and are being disposed of by a common judgment. In Criminal Appeal No. 49 of 1978, a lorry driver and two cleaners and in Criminal Appeal No. 24 of 1978 a lorry driver and a coolie were prosecuted for exporting fertilisers without a permit therefor from Madhya Pradesh to Maharashtra in contravention of the Fertilisers (Movement Control) Order, 1973 (for short the "FMC Order") read with Sections 3 and 7 of the Essential Commodities Act, 1955, (for short the "EC Act"). In both the cases, the trial Magistrate held that the prosecution had failed to prove that the accused were attempting to export the fertilisers and he therefore acquitted them. On the State preferring appeals against acquittal under Section 378(3) Criminal Procedure Code, the High Court declined to grant leave. Hence the State has preferred these appeals by special leave.

2. The facts in the two cases are identical. In Criminal Appeal No. 49 of 1978, a truck bearing Registration No. MPP 3668 carrying 200 bags of fertilisers and proceeding from Indore to Maharashtra was intercepted on 12-2-1974 at Sendhwa sales tax barrier situate at a distance of 8 miles from the border of Maharashtra State on the Agra-Bombay Road viz. National Highway No. 3. The lorry driver was in possession of invoices and other records but they did not include a permit issued under the FMC Order. In Criminal Appeal No. 24 of 1978, a lorry bearing Registration No. MPM 4866 proceeding from Indore to Maharashtra was similarly intercepted on 30-10-1973 at Sendhwa sales tax barrier. The truck was carrying 170 bags of fertilisers. The documents seized from the lorry driver contained the invoices and other records but they did not include a permit issued under the FMC Order. Consequently, the lorry driver and the cleaners in the first case and the lorry driver and the coolie in the second case were prosecuted under the FMC Order read with Sections 3 and 7 of the EC Act for exporting fertilisers from Madhya Pradesh to Maharashtra without a valid permit. In both the cases, the accused did not deny the factum of the transport of fertiliser bags in their respective lorries or the interception of the lorries and the seizure of the fertiliser bags or about the fertiliser bags not being covered by a permit issued under the FMC Order. The defence however was that they were not aware of the contents of the documents seized from them and that they were not engaged in exporting the fertiliser bags from Madhya Pradesh to Maharashtra in conscious violation of the provisions of the FMC Order.

3. The trial Magistrate as well as the High Court have taken the view that in the absence of the evidence of an employee of the transport company, there was no material in the cases to hold that the fertiliser bags were being exported to Maharashtra from Madhya Pradesh. The trial Magistrate and the High Court refused to attach any significance or importance to the invoices recovered from the lorry drivers because the drivers had said they had no knowledge of the contents of the documents seized from them. The trial Magistrate and the High Court have further opined that the materials on record would, at best, make out only a case of preparation by the accused to commit the offence and the evidence fell short of establishing that the accused were attempting to export the fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order.

4. As we have already stated, the respondents admit that the trucks in question were intercepted at Sendhwa sales tax barrier on 12-2-1974 and 30-10-1973 and they were carrying 200 bags and 170 bags of fertilisers respectively and the consignments were not covered by export permits issued under the FMC Order. In such circumstances what falls for consideration is whether the prosecution must prove *mens rea* on the part of the accused in exporting the fertiliser bags without a valid permit for securing their conviction and secondly whether the evidence on record established only preparation by the accused for effecting export of fertiliser bags from one State to another without a permit therefor and not an attempt to export fertiliser bags. For answering these questions, it is necessary to refer to some of the relevant provisions in the Fertiliser (Movement Control) Order, 1973 framed in exercise of the powers conferred under Section 3 of the EC Act. In the said Order, the relevant provisions to be noticed are clauses 2(*a*) and 3:

> 2. Definitions. — In this Order unless the context otherwise requires,—
>
> (a) 'Export' means to take or cause to be taken out of any place within a State to any place outside that State;
>
> 3. Prohibition of Export of Fertilisers .— No person shall export, or attempt to export, or abet the export of any fertilisers from any State. (emphasis supplied)

5. Section 7 of the Essential Commodities Act, 1955 provides the penalty for contravention of any order made under Section 3 and reads as under :

> 7. Penalties. — (1) If any person contravenes whether knowingly, intentionally or otherwise any order made under Section 3 —
>
> (a) he shall be punishable—
>
> (i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine; and
>
> (ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine; (emphasis supplied)

6. Taking up the first question for consideration, we may at once state that the trial Magistrate and the High Court have failed to comprehend and construe Section 7(1) of the Act in its full perspective. The words used in Section 7(1) are "if any person contravenes *whether knowingly, intentionally or otherwise* any order made under Section 3". The section is comprehensively worded so that it takes within its fold not only contraventions done knowingly or intentionally but even otherwise i.e. done unintentionally. The element of *mens rea* in export of fertiliser bags without a valid permit is therefore not a necessary ingredient for convicting a person for contravention of an order made under Section 3 if the factum of export or attempt to export is established by the evidence on record.

7. The sweep of Section 7(1) in the light of the changes effected by the legislature has been considered by one of us (Ahmadi, J.) in ***Swastik Oil Industries*** **v.** ***State*** [1978 (19) Guj. Law Reporter 117]. In that case, ***Swastik Oil Industries*** a licencee under the Gujarat Groundnut Dealers Licensing Order, 1966 was found to be in possession of 397 tins of groundnut oil in violation of the conditions of the licence and the provisions of the Licensing Order.

Consequently, the Collector ordered confiscation of 100 tins of groundnut oil from out of the 397 tins under Section 6(1) of the Essential Commodities Act. On the firm preferring an appeal, the appellate authority viz. Additional Sessions Judge, Kaira at Nadiad held "that clause (11) of the Licensing Order had been contravened but such contravention was not deliberate as it arose out of a mere *bona fide* misconception regarding the true content of clause (11) of the Licensing Order". The Additional Sessions Judge therefore held that the contravention was merely a technical one and not a wilful or deliberate one and hence the confiscation of 100 tins of groundnut oil was too harsh a punishment and that confiscation of only 25 tins would meet the ends of justice. Against this order, the firm preferred a petition under Article 227 of the Constitution to the High Court. Dealing with the matter, the High Court referred to Section 7 of the Act as it originally stood and the interpretation of the section in ***Nathu Lal* v. *State of Madhya Pradesh*** [AIR 1966 SC 43] wherein it was held that an offence under Section 7 of the Act would be committed only if a person *intentionally contravenes* any order made under Section 3 of the Act as *mens rea* was an essential ingredient of the criminal offence referred to in Section 7. The High Court then referred to the change brought about by the legislature to Section 7 after the decision in ***Nathu Lal*** case was rendered by promulgating Ordinance 6 of 1967 which was later replaced by Act 36 of 1967 and the change effected was that with effect from the date of the Ordinance i.e. 16-9-1967 the words "whether knowingly, intentionally or otherwise" were added between the word "contravenes" and the words and figure "any order made under Section 3". Interpreting the amendment made to the section the High Court held as follows:

> The plain reading of the section after its amendment made it clear that by the amendment, the legislature intended to impose strict liability for contravention of any order made under Section 3 of the Act. In other words, by the use of the express words the element of mens rea as an essential condition of the offence was excluded so that every contravention whether intentional or otherwise was made an offence under Section 7 of the Act. Thus by introducing these words in Section 7 by the aforesaid statutory amendment, the legislature made its intention explicit and nullified the effect of the Supreme Court dicta in ***Nathu Lal*** case.

8. The High Court thereafter proceeded to consider the further amendment effected to Section 7 of the Act pursuant to the recommendation of the Law Commission in its Forty-seventh Report.

9. Though for the purpose of the two appeals on hand, it would be enough if we examine the correctness of the view taken by the High Court in the light of the words contained in Section 7 of the Act as they stood at the relevant time viz. a contravention made of an order made under Section 3 "whether knowingly, intentionally or otherwise", it would not be out of place if we refer to the further change noticed by the High Court, which had been made to Section 7 by Parliament by an Ordinance which was later replaced by Amending Act 30 of 1974. The High Court has dealt with the further amendment made to Section 7(1) in the ***Swastik Oil Industries*** as follows and it is enough if we extract the same:

> But again in the year 1974, pursuant to the recommendations of the Law Commission in their Forty-seventh Report and the experience gained in the working of the Act, by an Ordinance, Section 7 of the Act was amended whereby the words 'whether knowingly,

intentionally or otherwise' which were introduced by Amending Act 36 of 1967 were deleted and the material part of Section 7(1) restored to its original frame and a new provision in Section 10 of the Act was added which reads as under:

10-C(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.— In this section, 'culpable mental state' includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

This Ordinance was replaced by Amending Act 30 of 1974. The effect of this subsequent change in the statute is that a presumption of guilty mind on the part of the accused in respect of offences under the Act, including Section 7, would arise and it would be open to the accused to rebut the same. As the law now stands in any prosecution under the Act which requires a culpable mental state on the part of the accused, the same must be presumed unless the accused proves that he had no such mental state with respect to the offence for which he is tried. Now according to the explanation to Section 10-C(1) culpable mental state includes intention, motive, knowledge of a fact and belief in or reason to believe a fact. The degree of proof expected to rebut the presumption has been indicated by sub-section (2) thereof which says that a fact will be said to be proved only if it exists beyond reasonable doubt and it will not be sufficient to prove its existence by preponderance of probability. Thus the burden of proof lies heavily on the accused to rebut the statutory presumption and the degree of proof expected that required for the proof of a fact by the prosecution. There can therefore be no doubt that the aforesaid legislative changes have reversed the thrust of the decision of the Supreme Court in ***Nathu Lal*** case and the same no longer holds the field.

10. Reverting back to Section 7 of the Act as amended by Act 36 of 1967, it is manifestly seen that the crucial words "whether knowingly, intentionally or otherwise" were inserted in Section 7 in order to prevent persons committing offences under the Act escaping punishment on the plea that the offences were not committed deliberately. The amendment was brought about in 1967 in order to achieve the avowed purpose and object of the legislation. To the same end, a further amendment came to be made in 1974, with which we are not now directly concerned but reference to which we have made in order to show the scheme of the Act and the amplitude of Section 7 at different stages.

11. We are in full agreement with the enunciation of law as regards Section 7 of the Act in ***Swastik Oil Industries***. We therefore hold that the trial Magistrate and the High Court were in error in taking the view that the respondents in each of the appeals were not liable for conviction for contravention of the FMC Order read with Sections 3 and 7 of the EC Act since the prosecution had failed to prove *mens rea* on their part in transporting fertiliser bags from Madhya Pradesh to Maharashtra.

12. As regards the second question, we find that the trial Magistrate and the High Court have again committed an error in taking the view that the respondents can at best be said to have only made preparations to export fertiliser bags from Madhya Pradesh to Maharashtra in contravention of the FMC Order and they cannot be found guilty of having attempted to export the fertiliser bags. In the commission of an offence there are four stages viz. intention, preparation, attempt and execution. The first two stages would not attract culpability but the third and fourth stages would certainly attract culpability. The respondents in each case were actually caught in the act of exporting fertiliser bags without a permit therefor from Madhya Pradesh to Maharashtra. The trucks were coming from Indore and were proceeding towards Maharashtra. The interception had taken place at Sendhwa sales tax barrier which is only 8 miles away from the border of Maharashtra State. If the interception had not taken place, the export would have become a completed act and the fertiliser bags would have been successfully taken to Maharashtra State in contravention of the FMC Order. It was not therefore a case of mere preparation viz. the respondents trying to procure fertiliser bags from someone or trying to engage a lorry for taking those bags to Maharashtra. They were cases where the bags had been procured and were being taken in the lorries under cover of sales invoices for being delivered to the consignees and the lorries would have entered the Maharashtra border but for their interception at the Sendhwa sales tax barrier. Surely, no one can say that the respondents were taking the lorries with the fertiliser bags in them for innocuous purposes or for mere thrill or amusement and that they would have stopped well ahead of the border and taken back the lorries and the feriliser bags to the initial place of dispatch or to some other place in Madhya Pradesh State itself. They were therefore clearly cases of attempted unlawful export of the fertiliser bags and not cases of mere preparation alone.

13. We have already seen that clause 3 forbids not only export but also attempt to export and abetment of export of any fertiliser from one State to another without a permit. It would therefore be wrong to view the act of transportation of the fertiliser bags in the trucks in question by the respondents as only a preparation to commit an offence and not an act of attempted commission of the offence. Hence the second question is also answered in favour of the State.

14. In the light of our pronouncement of the two questions of law, it goes without saying that the judgments of the trial Magistrate and the High Court under appeal should be declared erroneous and held unsustainable. The State ought to have been granted leave under Section 378(3) Cr.P.C and the High Court was wrong in declining to grant leave to the State. However, while setting aside the order of acquittal in each case and convicting the respondents for the offence with which they were charged we do not pass any order of punishment on the respondents on account of the fact that more than fifteen years have gone by since they were acquitted by the trial Magistrate. The learned Counsel for the appellant State was more interested in having the correct position of law set out than in securing punishment orders for the respondents in the two appeals for the offence committed by them. Therefore, while allowing the appeals and declaring that the trial Magistrate and the High Court were wrong in the view taken by them of the Fertiliser (Movement Control) Order read with Sections 3 and 7 of the Essential Commodities Act, we are not awarding any punishment to the respondents for the commission of the aforesaid offence.

Deo Narain v. *State of U.P.*

(1973) 1 SCC 347 : AIR 1973 SC 473

I.D. DUA, J. - This appeal is by special leave and is directed against the conviction of the appellant Deo Narain, by the High Court of Judicature at Allahabad on appeal by the State against the judgment and the order of the Sessions Judge of Ghazipur acquitting five accused persons, including the appellant of various charges including the charge under Section 302 read with Section 149, I. P. C. and in the alternative the charge against the appellant under Section 302, I. P. C.

2. It appears that there was some dispute with respect to the possession of certain plots of land in village Baruara, Police Station Dildarnagar, District Ghazipur. There were several legal proceedings between the rival parties with respect to both title and possession of the said plot. On September 17, 1965 after 12 noon there was a clash between the party of the accused and the party of the complainant. Both sides lodged reports with the police. The appellant Deo Narain, along with Chanderdeo and Lalji, two of the other accused persons acquitted by the trial court, whose acquittal was confirmed by the High Court, went to the Police Station Dildarnagar and made a report against the complainant's party about the occurrence at about 5.45 p.m. on September 17, 1965, but as the Station House Officer had already received information from the *chowkidar* that these accused persons had caused the death of one Chandrama, he took them into custody. Ram Nagina on behalf of the complainant's party lodged the report with the Police Station Kotwali which was adjacent to the District Hospital, Ghazipur and did not go to the Police Station Dildarnagar for making the report because of the long distance. The Sessions Judge, after an exhaustive discussion of the evidence produced both by the prosecution and the defence, came to the conclusion that the possession of the disputed plot of land was undoubtedly with the accused persons. The only further question which required determination by the trial court was, if the complainant's party had gone to the plot in question with an aggressive design to disturb the possession of the accused person by unlawful use of force and, if the accused persons had exceeded the right of private defence in beating and killing Chandrama and causing injuries to the other members of the complainant's party. According to the trial court the complainant's party had actually gone to the plots in question for the purpose of preventing the accused persons from cultivating and ploughing the said land. After considering the evidence on the record the trial court felt great difficulty in agreeing with either of the two rival versions given by the prosecution and the defence witness Mangia Rai about the manner in which the marpeet had taken place. The learned Sessions Judge, however, considered himself to be on firm ground in holding that the injuries suffered by Chanderdeo and Deo Narain rendered it difficult to believe that they had inflicted injuries with their spears on Bansnarain and others. It his opinion, had the accused persons been the aggressors they would not have abstained from causing injury to Raj Narain who was actually ploughing the field. In view of this improbability the learned Sessions Judge did not find it easy to place reliance on the statements of the prosecution witnesses Tin Taus, Raj Narain, Suresh and Bansnarain. Again, after examining the injuries sustained by the members of both parties, the learned Sessions Judge felt that Deo Narain and Chanderdeo must have received injuries on their heads before they inflicted injuries on the members of the complainant's party. On this

view the accused were held entitled to exercise the right of private defence, and to inflict the injuries in question in exercise of that right. On the basis of this conclusion the accused were acquitted.

3. On appeal by the State the High Court upheld the conclusions of the trial court that the accused persons had the right of private defence and that they were justified in exercising that right. But in its opinion that right had been exceeded by the appellant Deo Narain in inflicting the spear injuries on the chest of Chandrama, deceased, Chandrama had received one lacerated wound on the right side of his skull and one incised wound on the left shoulder with a punctured wound 4"deep on the right side of the chest. The last injury was responsible for his death. This injury, according to the High Court, was given by the appellant Deo Narain with his spear. The reasoning of the High Court in convicting the appellant, broadly stated, seems to be that it was only if the complainant's party had actually inflicted a serious injury on the accused that the right of private defence could arise justifying the causing of death. In the present case as only two members of the party of the accused persons, namely, Chanderdeo and Deo Narain, appellant, had received injuries which, though on the head, were not serious, they were not justified in using their spears. On this reasoning the High Court convicted the appellant, of an offence under Section 304, IPC and sentenced him to rigorous imprisonment for five years.

4. Before us the appellant's learned counsel has, after reading the relevant part of the impugned judgment of the High Court, submitted that the High Court has misdirected itself with regard to the essential ingredients and scope of the right of private defence. Our attention has been drawn to a recent decision of this Court in ***G.V. Subramanyan*** **v.** ***State of Andhra Pradesh*** [(1970) 3 SCR 473] where the scheme of the right of private defence of person and property has been analysed.

5. In our opinion, the High Court does seem to have erred in law in convicting the appellant on the ground that he had exceeded the right of private defence. What the High Court really seems to have missed is the provision of law embodied in Section 102, I. P. C. According to that section the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to present and imminent, and not remote or distant danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. If after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the appellant reasonably apprehended danger to his body even from a real threat on the part of the party of the complainant to assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of

private defence and to use adequate force against the wrongful aggressor in exercise of that right. There can be little doubt that on the conclusions of the two courts below that the party of the complainant had deliberately come to forcibly prevent or obstruct the possession of the accused persons and that this forcible obstruction and prevention was unlawful, the appellant could reasonably apprehend imminent and present danger to his body and to his companions. The complainants were clearly determined to use maximum force to achieve their end. He was thus fully justified in using force to defend himself and if necessary, also his companions, against the apprehended danger which was manifestly imminent. Again, the approach of the High Court that merely because the complainant's party had used *lathis*, the appellant was not justified in using his spear is no less misconceived and insupportable. During the course of a *marpeet*, like the present, the use of a *lathi* on the head may very well give rise to a reasonable apprehension that death of grievous hurt would result from an injury caused thereby. It cannot be laid down as a general rule that the use of a *lathi* as distinguished from the use of a spear must always be held to result only in a minor injury. Much depends on the nature of the *lathi*, the part of the body aimed at and the force used in giving the blow. Indeed, even a spear is capable of being so used as to cause a very minor injury. The High Court seems in this connection to have overlooked the provision contained in Section 100, IPC. We do not have any evidence about the size or the nature of the *lathi*. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a *lathi* on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a *lathi* has actually proved instantaneously fatal. If, therefore, a blow with a *lathi* is aimed at a vulnerable part like the head we do not think it can be laid down as a sound proposition of law that in such. cases the victim is not justified in using his spear in defending himself. In such moments of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High Court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High Court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the deceased though he himself had only received a superficial *lathi* blow on his head. This view of the High Court is not only unrealistic and unpractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter cannot be weighed in scales of gold.

6. Besides, it could not be said on the facts and circumstances of this case that the learned Sessions Judge had taken an erroneous or a wholly unreasonable view on the evidence with regard to the right of private defence when acquitting all the accused persons. No doubt, on appeal against acquittal the High Court is entitled to reappraise the evidence for itself but when the evidence is capable of two reasonable views, then, the view taken by the trial court demands due consideration. It is noteworthy that the High Court considered the learned Sessions Judge to be fully justified in acquitting the other accused persons and it was only in the case of the present appellant that the right of private defence was considered to have been exceeded on the sole ground that he had used his spear on the chest of the deceased with greater force than was necessary to prevent the deceased from committing unlawful aggression. Apparently the High Court seems to have implied that the appellant should have used the spear as a *lathi* and not the

spearhead for defending himself or should have given a less forceful thrust of the spear or on a less vulnerable part of the body and not on the chest, in order to be within the legitimate limits of the right of private defence. This, as already stated, is an erroneous approach because at such moments an average human being cannot be expected to think calmly and control his action by weighing as to how much injury would sufficiently meet the aggressive designs of his opponent. As a result there is clear miscarriage of justice.

7. For the foregoing reasons this appeal succeeds and allowing the same we acquit the appellant.

* * * * *

James Martin v. *State of Kerala*

(2004) 2 SCC 203

ARIJIT PASAYAT, J. Self-preservation is the prime instinct of every human being. The right of private defence is a recognized right in the criminal law. Therefore, Section 96 of Indian Penal Code, 1860 (in short 'the IPC') provides that nothing is an offence which is done in the exercise of the right of private defence. The question is, as happens in many cases, where exercise of such rights is claimed, whether the "*Lakshman Rekha*", applicable to its exercise has been exceeded. Section 99 IPC delineates the extent to which the right may be exercised.

2. The claim was made by the accused in the following background:

Appellant, James Martin, faced trial along with his father Xavier for alleged commission of offences punishable under Sections 302, 307, 326 read with Section 34 and Section 326 read with Section 114 IPC and Section 25(B)(1) of the of the Arms Act, 1959 (in short 'the Act') and Sections 27 and 30 thereof. Learned Sessions Judge, N. Paravur, found the present appellant (A-1) guilty of offences punishable under Section 304 Part I, 326 and 324 IPC, while the other accused was found guilty of the offences punishable under Section 304 Part I read with Section 34, 302 read with Sections 24, 324 IPC. Both the accused persons were sentenced to undergo imprisonment for 7 years and for the second offence, 2 years RI and fine of Rs.20,000/- with default stipulation of 1 year sentence. It was directed that in case fine was realized it was to be paid to PW-3. Each of the accused was also to undergo a sentence of RI for 1 year for the offence punishable under Section 324 IPC and to pay a fine of Rs.5,000/- with default stipulation of 6 months sentence. The fine, if any on realisation, was directed to be paid to PW-7 and PW-8. The fine was directed to be paid to PW-8. The sentences were directed to run concurrently.

5. The matrix of the litigation related to a *Bharat Bandh* on 15.3.1988 sponsored by some political parties. Prosecution version as unfolded during trial is as follows:

Most of the shops and offices were closed and vehicles were off the road. There were isolated instances of defiance to the *bandh* call and some incidents had taken place that, however, did not escalate to uncontrolled dimensions. Cheranelloor, where the concerned incidents took place, is a politically sensitive suburb of Kochi where accused appellant James and his father Xavier had their residence, besides a bread factory and a flour mill in the same compound. It was not anybody's case that they belonged to any political party or had credentials, which were unwholesome. By normal reckoning, their business activities flourished well. They owned a tempo van and other vehicles which were parked inside the compound itself. It was, however, said that their success in business was a matter of envy for Thomas Francis, their neighbour, particularly who filed complaints to the local authorities against the conduct of the mill and the factory and also filed a writ petition to get them closed down, but without success. He was one of the accused in S.C.No.74 of 1991 and according to the accused appellant-James was the kingpin and that the incident was wrought by him out of hatred and deep animosity towards James and Xavier.

6. The incident involved in this case took place at about 2.30 p.m. on 15.3.1988 when five young men, the two deceased in this case, namely, Mohan and Basheer (hereinafter referred to

as 'deceased' by their respective name), and PW-1, PW-2 and PW-4, who were activists of the *bandh*, as followers of the political parties which organized that *bandh* on that day, got into the flour mill of the A-2 through the unlocked gate leading access to that mill situate in a property comprising the residential building, a bread factory and other structures belonging to that accused. This group of five men on passing beside the mill of A-2 while they were perambulating the streets of Cheranelloor to have a first hand information as to the observance of the *bandh* on coming to know of the operation of the flour mill by A-2 proceeded to that place and made demands to PW-15, the employee of A-2 who was operating the mill to close down. An altercation took place between them and on hearing the commotion the accused, A-1 and A-2 who were inside their residential building, situate to the west of that mill, rushed to the place and directed the *bandh* activists to go out of the mill. As the activists of the *bandh* persisted in their demands for closing the mill, according to the prosecution, A-2 got out of the mill and on the instruction given by A-2, A-1 locked the gate of the compound from inside. Then both of them rushed back to the house with A-2 directing A-1 to take out the gun and shoot down the *bandh* activists by declaring that all of them should be finished off. On getting into the house and after closing the outer door of that building, both the accused rushed to the southern room of that building which faced the gate with a window opening to that side. The 1st accused on the instigation of the 2nd accused, his father, and having that accused beside him, fired at the *bandh* activists, who by that time had approached near the locked gate, by using an S.B.B.L. Gun through the window. The first shot fired from the gun hit against one of the *bandh* activists, who had got into the compound, namely Basheer, and he fell down beside the gate. The other four *bandh* activists requesting the 1st accused not to open fire rushed towards Basheer and, according to the prosecution, the first accused fired again with the gun indiscriminately causing injuries to all of them. Even when the first shot was fired from the gun, passersby in the road situate in front of that property also sustained injuries. When the firing continued as stated above some of the residents of the area who were standing beside the road also received gun shot injuries. On hearing the gun shots people of the locality rushed to the scene of occurrence and some of them by scaling over the locked gate broke open the lock and removed the injured to the road, from where they were rushed to the hospital in a tempo van along with the other injured who had also sustained gun shot injuries while they were standing beside the road. One among the injured, namely, Mohanan breathed his last while he was transported in the tempo to the hospital and another, namely, Basheer, succumbed to his injuries after being admitted at City Hospital, Ernakulam. All the other injured were admitted in that hospital to provide them treatment for the injuries sustained. After the removal of the injured to the hospital in the tempo as aforesaid, a violent mob which collected at the scene of occurrence set fire to the residential building, flour mill, bread factory, household articles, cycles, a tempo and scooter, parked in front of the residential building of the accused, infuriated by the heinous act of the accused in firing at the *bandh* activists and other innocent people as aforesaid. Soon after the firing both the accused and PW-15 escaped from the scene of occurrence and took shelter in a nearby house.

7. The information as to the occurrence of a skirmish and altercation between *bandh* activists and the accused and of an incident involving firing at Cheranelloor was received by

the police at Kalamassery Police Station from the Fire Station at Gandhi Nagar, Ernakulam, which was informed of such an incident over phone by a resident living close to the place of occurrence.

8. The accused on the other hand, took the stand that the firing resulting in the death of two *bandh* activists and sustaining of grievous injuries to several others occurred when their house and other buildings, situated in a common compound bounded with well protected boundary walls, and movable properties kept therein were set on fire by an angry mob of *bandh* activists when the accused failed to heed their unlawful demand to close down the flour mill which was operated on that day.

9. The trial Court discarded the prosecution version that the deceased and P.Ws who had sustained injuries had gone through the gate as claimed. On analysing the evidence it was concluded that they had scaled the walls. Their entry into premises of the accused was not lawful. It was also held that PW-15 was roughed up by the bandh activists, making him run away. A significant conclusion was arrived at that they were prepared and in fact used muscle power to achieve their ends in making the bandh a success. It was categorically held that the bandh activists on getting into the mill threatened, intimidated and assaulted PW-15 so as to compel him to close down the mill. He sustained injuries, and bandh activists indulged in violence before the firing took place at the place of occurrence. Accused asked PW-1, PW-2 and PW-4 to leave the place. It was noticed by the trial Court that the activists were in a foul and violent mood and had beaten up one Jossy, and this indicated their aggressive mood. They were armed with sharp edged weapons. Finally, it was concluded that the right of private defence was exceeded in its exercise.

10. On consideration of the evidence on record as noted above, the conviction was made by the trial Court and sentence was imposed. The trial Court came to hold that though the accused persons claimed alleged exercise of right of private defence the same was exceeded. The view was endorsed by the High Court by the impugned judgment so far as the present appellant is concerned. But benefit of doubt was given to A-2, father of the present appellant.

11. Mr. Sushil Kumar, learned senior counsel for the appellant submitted that the factual scenario clearly shows as to how the appellant was faced with the violent acts of the prosecution witnesses. Admittedly, all of them had forcibly entered into the premises of the appellant. PW-15 one of employees was inflicted severe injuries. In this background, the accused acted in exercise of right of private defence and there was no question of exceeding such right, as held by the trial Court and the High Court.

12. In response, learned counsel for the State submitted that after analyzing the factual position the trial Court and the High Court have rightly held that the accused exceeded the right of private defence and when two persons have lost lives, it cannot be said that the act done by the accused was within the permissible limits. He also pressed for accepting the prayer in the connected SLPs relating to acquittal of A-2 and conviction of the accused-appellant under Section 304 Part I.

13. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of

private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. [See ***Munshi Ram*** **v.** ***Delhi Administration*** (AIR 1968 SC 702), ***State of Gujarat*** **v.** ***Bai Fatima*** (AIR 1975 SC 1478), ***State of U.P.*** **v.** ***Mohd. Musheer Khan*** (AIR 1977 SC 2226) and ***Mohinder Pal Jolly*** **v.** ***State of Punjab*** (AIR 1979 SC 577)]. Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in ***Salim Zia*** **v.** ***State of U.P.*** [AIR 1979 SC 391] runs as follows:

> It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

14. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the

accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See ***Lakshmi Singh* v. *State of Bihar*** (AIR 1976 SC 2263)]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

15. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In ***Jai Dev* v. *State of Punjab*** [AIR 1963 SC 612] it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

16. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in ***Biran Singh* v. *State of Bihar*** (AIR 1975 SC 87). [See: ***Wassan Singh* v. *State of Punjab,*** (1996) 1 SCC 458, ***Sekar* v. *State,*** (2002) 8 SCC 354].

17. As noted in ***Butta Singh* v. *The State of Punjab*** [AIR 1991 SC 1316] a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who

were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation as is commensurate with the danger apprehended by him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment, on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

18. The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. [See ***Vidhya Singh*** v. ***State of M.P.*** (AIR 1971 SC 1857)]. Situations have to be judged from the subjective point of view of the accused concerned, in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

19. In the illuminating words of Russell (**Russell on *Crime***, 11th Edition, Volume I at page 49):

> a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable.

20. The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defense, not of retribution, expected to repel unlawful aggression and not as a retaliatory measure. While providing for exercise of the right, care has been taken in the IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

21. The background facts as noted by the trial Court and the High Court clearly show that the threat to life and property of the accused was not only imminent but did not cease, and it continued unabated. Not only there were acts of vandalism, but also destruction of property.

The High Court noticed that explosive substances were used to destroy the properties of the accused, but did not specifically answer the question as to whether destruction was prior or subsequent to the shooting by the accused. The High Court did not find the prosecution evidence sufficient to decide the question. In such an event the evidence of PW-15 who was also a victim assumes importance. The High Court without indicating any acceptable reason held on mere assumptions that his sympathy lies with the accused. The conclusion was unwarranted, because the testimony was acted upon by the Courts below as a truthful version of the incident. The trial Court found that an unruly situation prevailed in the compound of the accused as a result of the violence perpetrated by the *bandh* activists who got into the place by scaling over the locked gate and that their entry was unlawful too, besides intimidating and assaulting PW-15 and making him flee without shutting down the machines. The circumstances were also found to have necessitated a right of private defence. Even the High Court, candidly found that a tense situation was caused by the deceased and his friends, that PW-15 suffered violence and obviously there was the threat of more violence to the person and properties, that the events taking place generated a sort of frenzy and excitement rendering the situation explosive and beyond compromise. Despite all these to expect the accused to remain calm or to observe greater restraint in the teeth of the further facts found that the accused had only PW-15 who was already manhandled though they were outnumbered by their opponents (the *bandh* activists) and whose attitude was anything but peaceful would be not only too much to be desired but being unreasonably harsh and uncharitable, merely carried away only by considerations of sympathy for the lives lost, on taking a final account of what happened ultimately after everything was over. In the circumstances, the inevitable conclusion is that the acts done by the accused were in the reasonable limits of exercise of his right of private defence and he was entitled to the protection afforded in law under Section 96 IPC.

22. Accordingly we set aside the conviction and sentence imposed. The appeal is allowed. The bail bonds shall stand discharged so far as the present accused is concerned.

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Darshan Singh v. State of Punjab

(2010) 1 S.C.R. 642

Dalveer Bhandari, J.

1. This appeal is directed against the judgment and order of the Punjab & Haryana High Court in Criminal Appeal No.446- (Division Bench) of 1994 dated 6.8.2002.

2. Both Darshan Singh and Bakhtawar Singh were acquitted by the Sessions Court, Ludhiana. The said judgment of acquittal was set aside by the High Court of Punjab & Haryana at Chandigarh.

3. Darshan Singh and Bakhtawar Singh filed appeal against the said judgment before this court. During the pendency of this appeal, Bakhtawar Singh died and consequently the appeal filed by him abated.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:-

The dispute is between very close and intimate family members. Deceased Gurcharan Singh was the brother of Bakhtawar Singh and uncle of Darshan Singh. He was the father of Gurdish Singh, PW7, the informant. The agriculture fields of both brothers, Gurcharan Singh and Bakhtawar Singh were situated adjoining to each other. According to the prosecution, on 15.7.1991 at about 8 a.m. Gurdish Singh, PW7 and his father, Gurcharan Singh were irrigating their aforesaid fields and were also mending its ridges and at that time Gurdev Singh, PW8 and Ajit Singh were also present there. In the meantime, Darshan Singh and Bakhtawar Singh came there from the side of their fields raising lalkaras and abused the complainant party. Darshan Singh, accused was armed with D.B.B.L. gun and his father Bakhtawar Singh was carrying a Gandasa and they were saying that they would teach a lesson to the complainant party for cutting the ridges.

5. According to the further story of the prosecution, Bakhtawar Singh gave a Gandasa blow causing injuries on the chest of Gurcharan Singh. Gurcharan Singh was also having a Gandasa with him and in order to save himself he also caused injury on the head of Bakhtawar Singh. Thereafter, Darshan Singh fired two shots from his licensed gun which hit Gurcharan Singh in the chest and some of the pellets hit Gurdish Singh PW7 on his left upper arm and Gurdev Singh, PW8 on his left thigh. Gurcharan Singh fell down and died at the spot. Gurdish Singh and others retraced their steps in order to save themselves. Both the accused in order to save themselves ran towards their respective houses. Gurdish Singh, PW7 left the dead body of Gurcharan Singh and proceeded to the police station to lodge a report. Gurdev Singh PW8 also accompanied him. They met Om Prakash, ASI at about 9 a.m. at Barnala crossing where

Gurdish Singh PW7 gave his statement. It was then read over and explained to him who signed the same admitting the contents thereof to be correct. Om Prakash, ASI made his endorsement (Ex. N/1) and forwarded the statement to the police station, Rajkot and on the basis of which the case was registered against both the accused.

8. According to the prosecution, the motive of the crime was dispute regarding partition of land between both brothers Bakhtawar Singh and Gurcharan Singh. One year prior to the present incident, the village Panchayat had got the dispute compromised by a written agreement. There was a common well situated in the adjoining land. As a result of the compromise, the well along with a small piece of land attached to it was given to Gurcharan Singh and the land of common pathway leading to the well was given to the accused party. The compromise was not accepted by the accused party and they wanted repartition of the land attached to the well. This grievance led to this unfortunate incident.

15. According to the versions of the accused Darshan Singh and Bakhtawar Singh, Gurcharan first gave Gandasa blow hitting Bakhtawar Singh on the head and the injury caused on Bakhtawar Singh was an incised wound of 7 cm x 0.5 cm. on the parietal region of the right side of head. The wound was bone deep and 4 cm above the right pinna and clotted blood was present and after receiving these injuries in order to save himself, Darshan Singh fired at Gurcharan Singh and as a result of which he died. According to the accused, the entire act is covered by the right of private defence. According to the prosecution, Bakhtawar Singh gave first injury on the chest of Gurcharan Singh whereas according to the defence the first injury was given by Gurcharan Singh to Bakhtawar Singh. The appellant Darshan Singh fired only after the serious incised wound by a Gandasa was inflicted on his father Bakhtawar Singh and at that time in order to save his life he fired 2 shots which hit the deceased Gurcharan Singh leading to his death.

17. The trial court came to the conclusion that the presence of Gurdev Singh and Gurdish Singh at the time of alleged occurrence is highly doubtful. Dr. Mukesh Gupta also stated that injuries on the person of Gurdev Singh and Gurdish Singh could be caused by friendly hands and can be self suffered. He further stated in the cross examination that duration of the injuries was less than 6 hours. As per the prosecution case, the injuries were allegedly received by them at about 8 a.m. No pellet was recovered from the injuries of these witnesses namely, Gurdev Singh and Gurdish Singh. According to the trial court, the possibility of these injuries on their person having been fabricated at a later stage cannot be ruled out. The trial court also held that there was no mention of the injuries received by Gurdish Singh and Gurdev Singh in the inquest report whereas this fact finds mention in the first information report. According to the prosecution, Gurdish Singh suffered pellet injury on the left upper arm whereas, Gurdev Singh was hit on his left thigh. If it was so, there would have been mention of this fact in the inquest

report or the investigating officer must have prepared their injury statement, but neither any such injury statement was prepared at the spot nor their medical-examination was carried out. Om Prakash, ASI, in his cross-examination has admitted that he came to know about the injuries of Gurdish Singh and Gurdev Singh only when they gave their supplementary statements at the bus stand. According to the findings of the trial court, their injury statement was prepared at the spot and they were medically examined by Dr. Mukesh Gupta. Thus, according to the trial court the injuries were fabricated with connivance with the investigating officer just in order to make Gurdish Singh and Gurdev Singh stamp witnesses.

18. The trial court after discussing the entire evidence came to the conclusion that two counter versions of the case have been presented and, in the view of the trial court, the defence version is more probable and nearer to the truth for the following reasons:

……..
……
The story put forth by the prosecution that Gurcharan Singh was cutting weeds of ridges with Gandasa is not believable. Gurdish Singh stated that he was collecting the cut weeds. They were not having any Kassi or Khurpa and it was not possible to cut weeds of ridges with Gandasa.

(vii) The trial court came to a clear conclusion that Bakhtawar Singh was injured at point `F' as shown in the site plan at the hands of Gurcharan Singh (deceased). Gurcharan Singh after causing that injury forwarded towards Darshan Singh armed with Gandasa and at that point Darshan Singh had no option but to open fire and Gurcharan Singh died of that firearm injury. The trial court came to the definite conclusion that Darshan Singh fired a shot in his right of private defence.

(viii) The trial court after marshalling the entire evidence came to the conclusion that seeing from all angles, the probabilities of the case are much more in favour of the defence than in favour of the prosecution. The possibility of the injuries having been caused to Gurcharan Singh by Darshan Singh in exercise of private defence cannot be ruled out. Thus, the prosecution has failed to prove its case against the accused person beyond any reasonable doubt and the benefit has to be given to them.

20. Relevant provisions dealing with the right of private defence are sections 96 and 97 of the Indian Penal Code.

"96. Things done in private defence. - Nothing is an offence which is done in the exercise of the right of private defence.

97. Right of private defence of the body and of property. - Every person has a right subject to the restrictions contained in Section 99, to defend--
First.- His own body, and the body of any other person, against any offence affecting the human body;
Secondly.- The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

21. Section 100 of the Indian Penal Code is extracted as under:
"100. When the right of private defence of the body extends to causing death. -- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely: --
First. -- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
Secondly. -- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
Thirdly. -- An assault with the intention of committing rape;
Fourthly. -- An assault with the intention of gratifying unnatural lust;
Fifthly. -- An assault with the intention of kidnapping or abducting;
Sixthly. -- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."
22. Section 100 of the Indian Penal Code justifies the killing of an assailant when apprehension of atrocious crime enumerated in several clauses of the section is shown to exist. First clause of Section 100 applies to cases where there is reasonable apprehension of death while second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in a grievous hurt. In that event he can go to the extent of causing the latter's death in the exercise of the right of private defence even though the latter may not have inflicted any blow or injury on him.

23. It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was

reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

SCOPE AND FOUNDATION OF THE PRIVATE DEFENCE

24. The rule as to the right of private defence has been stated by Russel on Crime (11th Edn., Vol.1, p.491) thus:

"..... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable."
When enacting sections 96 to 106 of the Indian Penal Code, excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.

27. But there is another form of homicide which is excusable in self-defence. There are cases where the necessity for self- defence arises in a sudden quarrel in which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life.

28. The Indian Penal Code defines homicide in self-defence as a form of substantive right, and therefore, save and except the restrictions imposed on the right of the Code itself, it seems that the special rule of English Law as to the duty of retreating will have no application to this country where there is a real need for defending oneself against deadly assaults.

29. The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both

his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said: "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is noble movement which makes us forget our danger at the first cry of distress..... It concerns the public safety that every honest man should consider himself as the natural protector of every other." But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit or lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property.

30. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-defence is only right to defend oneself and not to retaliate. It is not a right to take revenge.

31. Right of private defence of person and property is recognized in all free, civilsed, democratic societies within certain reasonable limits. Those limits are dictated by two considerations : (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences.

33. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

34. This court in number of cases have laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilized jurisprudence. In Robert B. Brown v. United States of America (1921) 256 US 335, it is observed that a person in fear of his life in not expected to

modulate his defence step by step or tier by tier. Justice Holmes in the aforementioned case aptly observed "detached reflection cannot be demanded in the presence of an uplifted knife".

35. According to Section 99 of the Indian Penal Code the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right every reasonable allowance should be made for the bona fide defender. The courts in one voice have said that it would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack.

36. The courts have always consistently held that the right of private defence extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100 of the IPC. According to the combined effect of two clauses of section 100 IPC taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. When we see the principles of law in the light of facts of this case where Darshan Singh in his statement under section 313 has categorically stated that "Gurcharan Singh gave a gandasa blow hitting my father Bakhtawar Singh on the head as a result of which he fell down. I felt that my father had been killed. Gurcharan Singh then advanced towards me holding the gandasa. I apprehended that I too would be killed and I then pulled the trigger of my gun in self defence." Gurcharan Singh died of gun shot injury.

37. In the facts and circumstances of this case the appellant, Darshan Singh had the serious apprehension of death or at least the grievous hurt when he exercised his right of private defence to save himself.

BRIEF ENUMERATION OF IMPORTANT CASES:

47. In Kashmiri Lal & Others v. State of Punjab (1996) 10 SCC 471, this court held that "a person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat."

48. In James Martin v. State of Kerala (2004) 2 SCC 203, this court again reiterated the principle that the accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

50. In Mahabir Choudhary v. State of Bihar (1996) 5 SCC 107 this court held that "the High Court erred in holding that the appellants had no right to private defence at any stage. However, this court upheld the judgment of the sessions court holding that since the appellants had right to private defence to protect their property, but in the circumstances of the case, the appellants had exceeded right to private defence. The court observed that right to private defence cannot be used to kill the wrongdoer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence including killing".

51. In Munshi Ram & Others v. Delhi Administration (1968) 2 SCR 455, this court observed that "it is well settled that even if the accused does not plead self defence, it is open to consider such a plea if the same arises from the material on record. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of materials available on record.

52. In State of Madhya Pradesh v. Ramesh (2005) 9 SCC 705, this court observed "every person has a right to defend his own body and the body of another person against any offence, affecting the human body. The right of self defence commences as soon as reasonable apprehension arises and it is co-terminus with the duration of such apprehension. Again, it is defensive and not retributive right and can be exercised only in those cases where there is no time to have recourse to the protection of the public authorities."

54. In Vidhya Singh v. State of Madhya Pradesh (1971) 3 SCC 244, the court observed that "the right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this court, to adopt tests by detached objectivity which would be so natural in a court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of

only that much which is required in the thinking of a man in ordinary times or under normal circumstances."

57. In Buta Singh v. The State of Punjab (1991) 2 SCC 612, the court noted that a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private- defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self- preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact."

58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co- terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.
(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.
(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.
(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

59. The High Court in the impugned judgment has reversed the trial court's judgment of acquittal and convicted the accused. Admittedly, Darshan Singh fired from his 12-bore double barrel gun which had a number of pellets. The High Court disbelieved the trial court's version that Gurdish Singh and Gurdev Singh did not receive fire arm injuries because no pellet or pellets were recovered from their bodies. In the impugned order, the High Court without giving any cogent reasons has set aside the well considered judgment of the trial court.

60. In our view, when a shot was fired from a 12-bore gun and if no pellet was recovered, then the trial court is not wrong in arriving at the conclusion that the injuries were not caused by a fire arm. The High Court on this point discarded the reasoning of the trial court without any sound basis.

61. The High Court gave the finding that "since it is a case of dual version, one given by the complainant, who appears to be a truthful witness when he has not concealed the role of his father and explained the injury of Bakhtawar Singh. On the contrary, the accused persons have come with untenable defence." While arriving at this conclusion, the High Court in the impugned judgment has not followed the consistent legal position as crystallized by various judgments of this Court. The High Court or the Appellate Court would not be justified in setting aside a judgment of acquittal only on the ground that the version given by the complainant is more truthful.

62. In a case of acquittal, if the trial court's view is a possible or plausible view, then the Appellate Court or the High Court would not be justified in interfering with it. It is the settled legal position that there is presumption of innocence and that presumption is further fortified with the acquittal of the accused by the trial court. The Appellate Court or the High Court would not be justified in reversing the judgment of acquittal unless it comes to a clear conclusion that the judgment of the trial court is utterly perverse and, on the basis of the evidence on record, no other view is plausible or possible than the one taken by the Appellate Court or the High Court.

63. The High Court has unnecessarily laid stress on the point of recovery of the gun at the instance of Darshan Singh. The accused has not denied the incident. The case of the defence is that their case is covered by the right of private defence. Darshan Singh in his statement under Section 313 of the Code of Criminal Procedure, 1908 has admitted that he had fired from his licensed gun in his right of private defence. The High Court without properly comprehending the entire evidence on record reversed the well reasoned judgment of the trial court.

64. In the instant case after marshalling and scrutinizing the entire prosecution evidence, we are clearly of the view that the trial court's view is not only the possible or plausible view but it is based on the correct analysis and evaluation of the entire evidence on record. Rationally speaking, no other view is legally possible.

65. Consequently, this appeal is allowed and the impugned judgment of the High Court is set aside and the judgment of acquittal of the trial court is restored. The role attributed to the appellant is fully covered by his right of private defence. Consequently, the appellant is acquitted. The appellant was released on bail by this Court. He need not surrender. The appeal is accordingly allowed and disposed of.

State of Maharashtra v. *Mohd. Yakub*

(1980) 3 SCC 57: AIR 1980 SC 1111

R.S. SARKARIA, J. - This appeal by special leave preferred by the State of Maharashtra, is directed against a judgment, dated November 1, 1973, of the Bombay High Court.

2. Mohd. Yakub Respondent 1, Shaikh Jamadar Mithubhai Respondent 2, and Issak Hasanali Shaikh Respondent 3, were tried in the court of the Judicial Magistrate First Class, Bassein, Bombay, in respect of three acts of offences punishable under Section 135 read with Section 135(2) of the Customs Act, 1962. The *first* charge was the violation of Sections 12(1), 23(1) and 23(d) of the Foreign Exchange Regulation Act, 1947, the *second* was violation of Exports (Control) Order No. 1 of 1968 E. T.C. dated March 8, 1968; and the *third* was the contravention of the provisions of Sections 7, 8, 33 and 34 of the Customs Act, 1962. They were also charged for violation of the Exports (Control) Order No. 1 of 1968 E.T.C. dated March 8, 1968 issued under Sections 3 and of the Imports and Exports (Control) Act, 1947 punishable under Section 5 of the said Act. The gist of the charges was that the respondents attempted to smuggle out of India 43 silver ingots, weighing 1312.410 kgs., worth about Rs 8 lakhs, in violation of the Foreign Exchange Regulation Act, the Imports and Exports (Control) Act, 1947, and the Customs Act.

3. On receiving some secret information that silver would be transported in Jeep No. MRC-9930 and Truck No. BMS-796 from Bombay to a coastal place near Bassein, Shri Wagh, Suprintendent of Central Excise, along with Inspector Dharap and the staff proceeded in two vehicles to keep a watch on the night of September 14, 1968 at Shirsat Naka on the National Highway No. 8, Bombay City. At about midnight, the aforesaid jeep was seen coming from Bombay followed by a truck. These two vehicles were proceeding towards Bassein. The officers followed the truck and the jeep which, after travelling some distance from Shirsat Naka, came to a fork in the road and thereafter, instead of taking the road leading to Bassein, proceeded on the new National Highway leading to Kaman village and Ghodbunder creek. Ultimately, the jeep and truck halted near a bridge at Kaman creek where after the accused removed some small and heavy bundles from the truck and placed them aside on the ground. The customs officers rushed to the spot and accosted the persons present there. At the same time, the sound of the engine of a mechanised sea-craft, from the side of the creek, was heard by the officers. The officers surrounded the vehicle and found four silver ingots on the footpath leading to the creek. Respondent 1 was the driver and the sole occupant of the jeep, while the other two respondents were the driver and cleaner of the truck. The officers sent for Kana and Sathe, both residents of Bassein. In their presence, Respondent 1 was questioned about his identity. He falsely gave his name and address as Mohamed Yusuf s/o Sayyed Ibrabim residing at Kamathipura. From the personal search of Respondent 1, a pistol, knife and currency notes of Rs 2,133 were found. Fifteen silver ingots concealed in a shawl were found in the rear side of the jeep and twenty-four silver ingots were found lying under sawdust ba*y* in the truck. The truck and the jeep, together with the accused-respondents and the silver ingots, were taken to Shirsat Naka where a detailed *panchnama* was drawn up. Respondent 1 had no licence for

keeping a pistol. Consequently, the matter was reported to Police Station, Bassein, for prosecuting the respondent under the Arms Act.

4. The respondents and the vehicles and the silver ingots were taken to Bombay on September 15, 1968. The statements of the respondents under Section 108 of the Customs Act were recorded by Shri Wagh, Superintendent of Central Excise. The Collector, Central Excise, by his order dated May 28, 1969, confiscated the silver ingots. After obtaining the requisite sanction, the Assistant Collector, Central Excise made a complaint against all the three accused in the court of the Judicial Magistrate, Bassein, for trial in respect of the aforesaid offences.

5. The plea of the accused was of plain denial of the prosecution case. They stated that they were not aware of the alleged silver and that they had just been employed for carrying the jeep and the truck to another destination. They alleged that they were driven to the creek by the police.

6. The trial Magistrate convicted the accused of the aforesaid offences and sentenced Accused 1 to two years' rigorous imprisonment and a fine of Rs 2000 and, in default, to suffer further six months' rigorous imprisonment. Accused 2 and 3 were to suffer six months' rigorous imprisonment and to pay a fine of Rs 500 and, in default, to suffer two months' rigorous imprisonment.

7. The accused preferred three appeals in the court of the Additional Sessions Judge, Thana, who, by his common judgment dated September 30, 1973, allowed the appeals and acquitted them on the ground that the facts proved by the prosecution fell short of establishing that the accused had 'attempted' to export silver in contravention of the law, because the facts proved showed no more than that the accused had only made 'preparation' for bringing this silver to the creek and "had not yet committed any act amounting to a direct movement towards the commission of the offence". In his view, until silver was put in the boat for the purpose of taking out of the country with intent to export it, the matter would be merely in the. stage of preparation falling short of an 'attempt' to export it. Since 'preparation' to commit the offence of exporting silver was not punishable under the Customs Act, he acquitted the accused.

8. Against this acquittal, the State of Maharashtra carried an appeal to the High Court, which, by its judgment dated November 1, 1973, dismissed the appeal and upheld the acquittal of the accused-respondents. Hence, this appeal.

9. In the instant case, the trial Court and the Sessions Judge concurrently held that the following circumstances had been established by the prosecution:

(a) The officers (Shri Wagh and party) had received definite information that silver would be carried in a truck and a jeep from Bombay to Bassein for exporting from the country and for this purpose they kept a watch at Shirsat Naka and then followed the jeep and the truck at some distance.
(b) Accused 1 was driving the jeep, while Accused 2 was driving the truck and Accused 3 was cleaner on it.
(c) Fifteen silver ingots were found concealed in the jeep and 24 silver ingots were found hidden in the truck.
(d) The jeep and the truck were parked near the Kaman creek from where they could be easily loaded in some sea-craft.

(e) Four silver ingots from the vehicle had been actually unloaded and were found lying by the side of the road near the footpath leading to the sea.

(f) On being questioned, Accused 1 gave his false name and address.

(g) The accused were not dealers in silver.

10. The trial Magistrate further held that just when the officers surrounded these vehicles and caught the accused, the sound of the engine of a mechanised vessel was heard from the creek. The first appellate Court did not discount this fact, but held that this circumstance did not have any probative value.

11. The question, therefore, is whether from the facts and circumstances, enumerated above, it could be inferred beyond reasonable doubt that the respondents had attempted to export the silver in contravention of law from India?

12. At the outset, it may be noted that the Evidence Act does not insist on absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proved' does not draw any distinction between circumstantial and other evidence. Thus, if the circumstances listed above establish such a high degree of probability that a prudent man ought to act on the supposition that the appellant was attempting to export silver from India in contravention of the law that will be sufficient proof of that fact in issue.

13. Well then, what is an "attempt" Kenny in his ***OUTLINES OF CRIMINAL LAW*** defined "attempt" to commit a crime as the "last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control". This definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in ***Abhayanand Mishra* v. *State of Bihar*** [AIR 1961 SC 1698] there is a distinction between 'preparation' and 'attempt'. Attempt begins where preparation ends. In sum, a person commits the offence of 'attempt to commit a particular offence' when (*i*) he *intends* to commit that particular offence and (*ii*) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence *but must be an act during the course of committing that offence.*

14. Now, let us apply the above principles to the facts of the case in hand. The intention of the accused to export the silver from India by sea was clear from the circumstances enumerated above. They were taking the silver ingots concealed in the two vehicles under the cover of darkness. They had reached close to the sea-shore and had started unloading the silver there near a creek from which the sound of the engine of a sea-craft was also heard. Beyond the stage of preparation, most of the steps necessary in the course of export by sea had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea-craft for moving out of the territorial waters of India. But for the intervention of the officers of law, the unlawful export of silver would have been consummated. The clandestine disappearance of the sea-craft when the officers intercepted and rounded up the vehicles, and the accused at the creek reinforces the inference that the accused had deliberately attempted to export silver by sea in contravention of law.

15. It is important to bear in mind that the penal provisions with which we are concerned have been enacted to suppress the evil of smuggling precious metal out of India. Smuggling is an anti-social activity which adversely affects the public revenues, the earning of foreign exchange, the financial stability and the economy of the country. A narrow interpretation of the word "attempt" therefore, in these penal provisions which will impair their efficacy as instruments for combating this baneful activity has to be eschewed. These provisions should be construed in a manner which would suppress the mischief, promote their object, prevent their subtle evasion and foil their artful circumvention. Thus construed, the expression "attempt" within the meaning of these penal provisions is wide enough to take in its fold any one or series of acts committed, beyond the stage of preparation in moving the contraband goods deliberately to the place of embarkation, such act or acts being reasonably proximate to the completion of the unlawful export. The inference arising out of the facts and circumstances established by the prosecution, unerringly pointed to the conclusion, that the accused had committed the offence of attempting to export silver out of India by sea, in contravention of law.

16. For reasons aforesaid, we are of opinion that the High Court was in error in holding that the circumstances established by the prosecution fell short of constituting the offence of an 'attempt' to export unlawfully, silver out of India. We, therefore, allow this appeal, set aside the acquittal of the accused-respondents and convict them under Section 135(1)(*a*) of the Customs Act, 1962 read with Section 5 of the Imports and Exports (Control) Act, 1947 and the order issued thereunder, and sentence them as under:

17. Accused-Respondent 1, Mohd. Yakub is sentenced to suffer one year's rigorous imprisonment with a fine of Rs 2000 and, in default, to suffer six months' further rigorous imprisonment. Accused-Respondents 2 and 3, namely Shaikh Jamadar Mithubhai and Issak Hasanali Shaikh are each sentenced to six months' rigorous imprisonment with a fine of Rs 500 and, in default to suffer two months' further rigorous imprisonment.

CHINNAPPA REDDY, J. (*concurring*) - I concur in the conclusion of my brother Sarkaria, J. in whose judgment the relevant facts have been set out with clarity and particularity. I wish to add a few paragraphs on the nature of the *actus reus* to be proved on a charge of an attempt to commit an offence.

19. The question is what is the difference between preparation and perpetration?

20. An attempt to define 'attempt' has to be a frustrating exercise. Nonetheless a search to discover the characteristics of an attempt, if not an apt definition of attempt, has to be made.

21. In England Parke, B. described the characteristics of an 'attempt' in ***Reg.* v. *Eagleton*** [(1855) Dears CC 515] as follows:

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are . . .

22. The dictum of Parke, B. is considered as the locus classic us on the subject and the test of 'proximity' suggested by it has been accepted and applied by English courts though with occasional but audible murmur about the difficulty in determining whether an act is immediate or remote. Vide, Lord Goddard, C.J. in ***Gardner* v. *Akeroyd*** [(1952) 2 All ER 306] ". . . it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt '. Parke, B., himself appeared to have thought that the last possible act before the achievement of the end constituted the attempt. This was indicated by him in the very case of ***Reg.* v. *Eagleton*** where he further observed:

> . . . and if, in this case . . . any further step on the part of the defendant had been necessary to obtain payment . . . we should have thought that the obtaining credit . . . would not have been sufficiently proximate to the obtaining of the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself towards the payment of the money, and therefore it ought to be considered as an attempt.

As a general principle the test of 'the last possible act before the achievement of the end' would be entirely unacceptable. If that principle be correct, a person who has cocked his gun at another and is about to pull the trigger but is prevented from doing so by the intervention of someone or something cannot be convicted of attempt to murder.

23. Another popular formulation of what constitutes 'attempt' is that of Stephen in his ***DIGEST OF THE CRIMINAL LAW*** where he said:

> An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts, which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

While the first sentence is an attempt at defining 'attempt', the second sentence is a confession of inability to define. The attempt at definition fails precisely at the point where it should be helpful. See the observations of Parker, C.J. in ***Davey* v. *Lee*** [(1968) 1 QB 366] and of Prof. Glanville Williams in his essay on Police Control of Intending Criminal in 1955 ***Criminal Law Review***.

24. Another attempt at definition was made by Professor Turner in (1934)5 **Cambridge Law Journal** 230, and this was substantially reproduced in Archbold's ***CRIMINAL PLEADING, EVIDENCE AND PRACTICE*** (36th Edn.). Archbold's reproduction was quoted with approval in ***Davey* v. *Lee*** and was as follows:

> . . . the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of a specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

25. We must at once say that it was not noticed in Archbold's (36th Edn.) nor was it brought to the notice of the Divisional Court which decided ***Davey* v. *Lee*** [**RUSSEL ON *CRIME*** (12th Edn.) edited by Prof. Turner, p. 18] that Prof. Turner was himself not satisfied with the definition propounded by him and felt compelled to modify it, as he thought that to require that the act could not reasonably be regarded as having any other purpose than the commission of the specific crime went too far and it should be sufficient "to show *prima facie*, the offender's intention to commit the crime which he is charged with attempting".

26. Editing 12th edition of **Russell on *Crime*** and 18th edition of Kenny's ***OUTLINES OF CRIMINAL LAW***, Professor Turner explained his modified definition as follows:

> It is therefore suggested that a practical test for actus reus in attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they themselves clearly indicate what was the end towards which they were directed. In other words the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime which he is charged with attempting. That there may be abundant other evidence to establish his mens rea (such as a confession) is irrelevant to the question of whether he had done enough to constitute the actus reus.

We must say here that we are unable to see any justification for excluding evidence aliunde on the question of *mens rea* in considering what constitutes the *actus reus.* That would be placing the *actus reus* in too narrow a pigeon-hole.

27. In ***Haughton* v. *Smith***, [1975 AC 476 492], Hailsham, L.C. quoted Parke, B. from the ***Eagleton*** case and Lord Parker, C.J. from ***Davey* v. *Lee*** and proceeded to mention three propositions as emerging from the two definitions:

> (1) There is a distinction between the intention to commit a crime and an attempt to commit it .... (2) In addition to the intention, or mens rea, there must be an overt act of such a kind that it is intended to form and does form part of a series of acts which would constitute the actual commission of the offence if it were not interrupted . . . . (3) The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in Reg. v. Eagleton, as being 'proximate' to the completion of the offence in Davey v. Lee as being 'immediately and not merely remotely connected with the completed offence . . .

28. In ***Director of Public Prosecutions* v. *Stonehouse*** [(1977) 2 All ER 909] Lord Diplock and Viscount Dilhorne, appeared to accept the 'proximity' test of Parke, B., while Lord Edmund-Davies accepted the statement of Lord Hailsham as to what were the true ingredients of a criminal attempt. Whatever test was applied, it was held that the facts clearly disclosed an attempt in that case.

29. In India, while attempts to commit certain specified offences have themselves been made specific offences (e.g.;. Sections 307, 308, Indian Penal Code etc.), an attempt to commit

an offence punishable under the Penal Code, generally, is dealt with under Section 511, Indian Penal Code. But the expression 'attempt' has not been defined anywhere.

30. In ***Abhayanand Mishra*** **v.** ***State of Bihar***, Raghubar Dayal and Subba Rao, JJ., disapproved of the test of last act which if uninterrupted and successful would constitute a criminal offence and summarised their views as follows:

> A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

31. In ***Malkiat Singh*** **v.** ***State of Punjab*** [(1969) 2 SCR 663, 667] a truck which was carrying paddy, was stopped at Samalkha 32 miles from Delhi and about 15 miles from the Delhi-Punjab boundary. The question was whether the accused were attempting to export paddy from Punjab to Delhi. It was held that on the facts of the case, the offence of attempt had not been committed. Ramaswami, J., observed:

> The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey.

We think that the test propounded by the first sentence should be understood with reference to the facts of the case. The offence alleged to be contemplated was so far removed from completion in that case that the offender had yet ample time and opportunity to change his mind and proceed no further, his earlier acts being completely harmless. That was what the court meant, and the reference to the appellants in the sentence where the test is propounded makes it clear that the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.

32. Let me now state the result of the search and research: In order to constitute 'an attempt', first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be 'proximate' to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention; but, that it must be, that is, it must be indicative or suggestive of the intention. For instance, in the instant case, had the truck been stopped and searched at the very commencement of the journey or even at Shirsat Naka, the discovery of silver ingots in the truck might at the worst lead to the inference that the accused had prepared or were preparing for the commission of the offence. It

could be said that the accused were transporting or attempting to transport silver somewhere but it would not necessarily suggest or indicate that the intention was to export silver. The fact that the truck was driven up to a lonely creek from where the silver could be transferred into a sea-faring vessel was suggestive or indicative though not conclusive, that the accused wanted to export the silver. It might have been open to the accused to plead that the silver was not to be exported but only to be transported in the course of inter-coastal trade. But, the circumstance that all this was done in a clandestine fashion, at dead of night, revealed, with reasonable certainty, the intention of the accused that the silver was to be exported.

33. In the result I agree with the order proposed by Sarkaria, J.

* * * * *

Smt. Gian Kaur v. *State of Punjab*

(1996) 2 SCC 648

J.S. VERMA, J. Leave granted in special leave petitions.

2. The appellants Gian Kaur and her husband Harbans Singh were convicted by the Trial Court under Section 306, Indian Penal Code, 1860 (for short "IPC") and each sentenced to six years R.I. and fine of Rs. 2,000/-, or, in default, further R.I. for nine months, for abetting the commission of suicide by Kulwant Kaur. On appeal to the High Court, the conviction of both has been maintained but the sentence of Gian Kaur alone has been reduced to R.I. for three years. These appeals by special leave are against their conviction and sentence under Section 306, IPC.

3. The conviction of the appellants has been assailed, *inter alia*, on the ground that Section 306, IPC is unconstitutional. The first argument advanced to challenge the constitutional validity of Section 306, IPC rests on the decision in ***P. Rathinam* v. *Union of India*** [(1994) 3 SCC 394] by a Bench of two learned Judges of this Court wherein Section 309, IPC has been held to be unconstitutional as violative of Article 21 of' the Constitution. It is urged that 'right to die' being included in Article 21 of the Constitution as held in ***P. Rathinam*** declaring Section 309, IPC to be unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of the fundamental right under Article 21; and, therefore, Section 306. IPC penalising assisted suicide is equally violative of Article 21. This argument, it is urged, is alone sufficient to declare that Section 306, IPC also is unconstitutional being violative of Article 21 of the Constitution.

4. One of the points directly raised is the inclusion of the `right to die' within the ambit of Article 21 of the Constitution, to contend that any person assisting the enforcement of the `right to die' is merely assisting in the enforcement of the fundamental right under Article 21 which cannot be penal; and Section 306, IPC making that act punishable, therefore, violates Article 21. In view of this argument based on the decision in ***P. Rathinam***, a reconsideration of that decision is inescapable.

5. In view of the significance of this contention involving a substantial question of law as to the interpretation of Article 21 relating to the constitutional validity of Section 306, I.P.C. which requires reconsideration of their decision in ***P.Rathinam***, the Division Bench before which these appeals came up for hearing has referred the matter to a Constitution Bench for deciding the same. This is how the matter comes before the Constitution Bench.

6. In addition to the learned counsel for the parties the learned Attorney General of India who appeared in response to the notice, we also requested Shri Fali S. Nariman and Shri Soli J. Sorabjee, Senior Advocates to appear as *amicus curiae* in this matter. All the learned counsels appearing before us have rendered great assistance to enable us to decide this ticklish and sensitive issue.

7. We may now refer to the submissions of the several learned counsel who ably projected the different points of view.

8. Shri Ujagar Singh and Shri B.S. Malik appeared in these matters for the appellants to support the challenge to the constitutional validity of Sections 306 and 309, IPC. Both the

learned counsels contended that Section 306 as well as Section 309 are unconstitutional. Both of them relied on the decision in ***P. Rathinam***. However, Shri Ujagar Singh supported the conclusion in ***P. Rathinam*** of the constitutional invalidity of Section 309, IPC only on the ground of violation of Article 14 and not Article 21. Shri B.S. Malik contended that Section 309 is violative of Articles 14 and 21. He strongly relied on the ground based on Article 21 in ***P. Rathinam*** for holding Section 309 to be invalid. He urged that "right to die" being included within the ambit of Article 21, assistance in commission of suicide cannot be an offence and, therefore, Section 306 IPC also is violative of Article 21. He contended that Section 306 is unconstitutional for this reason alone. Shri S.K. Gambhir appearing in one of the connected matters did not advance any additional argument.

9. The learned Attorney General contended that Section 306 IPC constitutes a distinct offence and can exist independently of Section 309 IPC. The learned Attorney General did not support the decision in ***P. Rathinam*** and the construction made of Article 21 therein to include the "right to die". Shri F.S. Nariman submitted that Sections 306 and 309 constitute independent substantive offences and Section 306 can exist independently of Section 309. Shri Nariman then contended that the desirability of deleting Section 309 from the IPC is different from saying that it is unconstitutional. He also submitted that the debate on euthanasia is not relevant for deciding the question of constitutional validity of Section 309. He submitted that Article 21 cannot be construed to include within it the so called 'right to die' since Article 21 guarantees protection of life and liberty and not its extinction. He submitted that Section 309 does not violate even Article 14 since the provision of sentence therein gives ample discretion to apply that provision with compassion to an unfortunate victim of circumstances attempting to commit suicide. Shri Nariman referred to the reported decisions to indicate that the enforcement of this provision by the courts has been with compassion to ensure that it is not harsh in operation. Shri Nariman submitted that the decision in ***P. Rathinam*** requires reconsideration as it is incorrect. Shri Soli J. Sorabjee submitted that Section 306 can survive independently of Section 309, IPC as it does not violate either Article 14 or Article 21. Shri Sorabjee did not support the construction made of Article 21 in ***P. Rathinam*** to include therein the 'right to die' but he supported the conclusion that Section 309 is unconstitutional on the ground that it violates Article 14 of the Constitution. Shri Sorabjee submitted that it has been universally acknowledged that a provision to punish attempted suicide is monstrous and barbaric and, therefore, it must be held to be violative of Article 14 of the Constitution. Shri Sorabjee's argument, therefore, is that Section 306, IPC must be upheld as constitutional but Section 309 should be held as unconstitutional, not as violative of Article 21 as held in ***P. Rathinam*** but being violative of Article 14 of the Constitution. He also sought assistance from Article 21 to support the argument based on Article 14.

10. At this stage, it would be appropriate to refer to the decisions wherein the question of constitutional validity of Section 309, IPC was considered.

11. ***Maruti Shripati Dubal*** **v.** ***State of Maharashtra*** [(1987) Cri.L.J. 743] is the decision by a Division Bench of the Bombay High Court. In that decision, P.B.Sawant, J., as he then was, speaking for the Division Bench held that Section 309 IPC is violative of Article 14 as well as Article 21 of the Constitution. The provision was held to be discriminatory in nature and also arbitrary so as to violate the equality guaranteed by Article 14. Article 21 was

construed to include the ‘right to die’, or to terminate one's own life. For this reason it was held to violate Article 21 also.

12. ***State*** v. ***Sanjay Kumar Bhatia*** [(1985) Cri.L.J. 931] is the decision of the Delhi High Court. Sachar, J., as he then was, speaking for the Division Bench said that the continuance of Section 309 IPC is an anachronism unworthy of human society like ours. However, the question of its constitutional validity with reference to any provision of the Constitution was not considered. Further consideration of this decision is, therefore, not necessary.

13. ***Chenna Jagadeeswar*** **v.** ***State of Andhra Pradesh*** [1988 Cr.L.J.549] is the decision by a Division Bench of the Andhra Pradesh High Court. The challenge to the constitutional validity of Section 309 IPC was rejected therein. The argument that Article 21 includes the ‘right to die’ was rejected. It was also pointed out by Amarethwari, J. speaking for the Division Bench that the Courts have sufficient power to see that unwarranted harsh treatment or prejudice is not meted out to those who need care and attention. This negatived the suggested violation of Article 14.

14. The only decision of this Court is ***P.Rathinam*** by a Bench of two learned Judges. Hansaria, J. speaking for the Division Bench rejected the challenge to the constitutional validity of Section 309 based on Article 14 but upheld the challenge on the basis of Article 21 of the Constitution. The earlier decisions of the Bombay High Court and the Andhra Pradesh High Court were considered and agreement was expressed with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14. The decision then proceeds to consider the challenge with reference to Article 21 of the Constitution. It was held that Article 21 has enough positive content in it so that it also includes the 'right to die' which inevitably leads to the right to commit suicide. Expressing agreement with the view of the Bombay High Court in respect of the content of Article 21, it was held as under:

> Keeping in view all-the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

The conclusion of the discussion was summarised as under:

> On the basis of what has been held and noted above, we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.
>
> We, therefore, hold that Section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wavelength. (Page 429)

15. At this stage it may be mentioned that reference has been made in ***P.Rathinam*** and the Bombay High Court decision to the debate relating to euthanasia, the sociological and psychological factors contributing to suicidal tendencies and the global debate on the

desirability of not punishing 'attempt to commit suicide'. The absence of provisions to punish attempted suicide in several jurisdictions has also been noticed. The desirability of attempted suicide not being made a penal offence and the recommendation of the Law Commission to delete Section 309 from the Indian Penal Code has also been adverted to. We may refer only to the recommendation contained in the ***42nd Report*** (1971) of the Law Commission of India which contains the gist of this logic and was made taking into account all these aspects. The relevant extract is, as under:

> 16.31 Section 309 penalizes an attempt to commit suicide. It may be mentioned that suicide was regarded as permissible in some circumstances in ancient India. In the Chapter on "The hermit in the forest", Manu's Code (See: ***Laws of Manu***, translated by George Buhler, ***Sacred Books of the East*** edited by F.Max Muller, (1967 Reprint) Vol.25, page 204,J Shlokas 31 ad 32) says –
>
> > '31. Or let him walk, fully determined and going straight on, in a north-easterly direction, subsisting on water and air, until his body sinks to rest.
> >
> > 32. A Brahmana having got rid of his body by one of those modes (i.e. drowning, precipitating burning or starving) practised by the great sages, is exalted in the world of Brahamana, free from sorrow and fear.'

Two commentators of Manu, Govardhana and Kulluka (See ***Medhatithi's commentary on Manu***), say that a man may undertake the *mahaprasthana* (great departure) on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and that, because it is taught in the Sastras, it is not opposed to the Vedic rules which forbid suicide (See : ***Laws of Manu***, translated by George Buhler, ***Sacred Books of the East*** edited by F.Max Muller, (1967 Reprint) Vol.25, page 204, footnote 31). To this Max Muller adds a note as follows :- (See: *Ibid*)

> From the parallel passage of Apas tambha II, 23, 2, it is, however, evident that a voluntary death by starvation was considered the befitting conclusion of a hermit's life. The antiquity and general prevalence of the practice may be inferred from the fact that the Jaina ascetics, too, consider it particularly meritorious.

16.32 Looking at the offence of attempting to commit suicide, it has been observed by an English writer: (See: H.Romilly Fedden: ***Suicide*** (London, 1938), page 42).

> It seems a monstrous procedure to inflict further suffering on even a single individual who has already found life so unbearable, his chances of happiness so slender, that he has been willing to face pain and death in order to cease living. That those for whom life is altogether bitter should be subjected to further bitterness and degradation seems perverse legislation.
>
> Acting on the view that such persons deserve the active sympathy of society and not condemnation or punishment, the British Parliament enacted the Suicide Act in 1961 whereby attempt to commit suicide ceased to be an offence.
>
> 16.33 We included in our Questionnaire the question whether attempt to commit suicide should be punishable at all. Opinion was more or less equally divided. We are, however definitely of the view that the penal Provision is harsh and unjustifiable and it should be repealed." (emphasis supplied)

16. A Bill was introduced in 1972 to amend the Indian Penal Code by deleting Section 309. However, the Bill lapsed and no attempt has been made as yet to implement that recommendation of the Law Commission.

17. The desirability of retaining Section 309 in the statute is a different matter and non-sequitur in the context of constitutional validity of that provision which has to be tested with reference to some provision in the Constitution of India. Assuming for this purpose that it may be desirable to delete Section 309 from the Indian Penal Code for the reasons which led to the recommendation of the Law Commission and the formation of that opinion by persons opposed to the continuance of such a provision, that cannot be a reason by itself to declare Section 309 unconstitutional unless it is held to be violative of any specific provision in the Constitution. For this reason, challenge to the constitutional validity of Section 309 has been made and is also required to be considered only with reference to Articles 14 and 21 of the Constitution. We, therefore, proceed now to consider the question of constitutional validity with reference to Articles 14 and 21 of the Constitution. Any further reference to the global debate on the desirability of retaining a penal provision to punish attempted suicide is unnecessary for the purpose of this decision. Undue emphasis on that aspect and particularly the reference to euthanasia cases tends to befog the real issue of the constitutionality of the provision and the crux of the matter which is determinative of the issue.

18. In ***P. Rathinam*** it was held that the scope of Article 21includes the 'right to die'. ***P. Rathinam*** held that Article 21 has also a positive content and is not merely negative in its reach. Reliance was placed on certain decisions to indicate the wide ambit of Article 21 wherein the term life' does not mean 'mere animal existence' but right to live with human dignity' embracing quality of life. Drawing analogy from the interpretation of freedom of speech and expression' to include freedom not to speak, freedom of association and movement' to include the freedom not to join any association or to move anywhere, freedom of business' to include freedom not to do business, it was held in ***P. Rathinam*** that logically it must follow that right to live would include right not to live, i.e., right to die or to terminate one's life. Having concluded that Article 21 includes also the right to die, it was held that Section 309. IPC was violative of Article 21. This is the only basis in ***P. Rathinam*** to hold that Section 309, IPC is unconstitutional.

'*Right to die*' - *Is it included in Article 21*?

19. The first question is: Whether, the scope of Article 21 also includes the 'right to die'? Article 21 is as under: Article 21

> 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."

20. A significant part of the judgment in ***P. Rathinam*** on this aspect is as under:

> If a person has a right to live, question is whether he has right not to live. The Bombay High Court stated in paragraph 10 of its judgment that as all the fundamental rights are to be read together, as held in R.C. Cooper v. Union of India [(1970) 1 SCC 248] what is true of one fundamental right is also true of another fundamental right. It was then stated that is not, and cannot be, seriously disputed that fundamental rights have their positive as well as negative aspects. For example, freedom of speech and expression includes freedom not to speak. Similarly, the freedom of association and movement

includes freedom not to join any association or move anywhere. So too, freedom of business includes freedom not to do business. It was, therefore, stated that logically it must follow that the right to live will include right not to live, i.e., right to die or to terminate one's life.

Two of the above named and critics of the Bombay judgment have stated that the aforesaid analogy is "misplaced", which could have arisen on account of superficial comparison between the freedoms, ignoring the inherent difference between one fundamental right and ,the other. It has been argued that the negative aspect of the right to live would mean the end or extinction of the positive aspect, and so, it is not the suspension as such of the right as is in the case of 'silence' or 'non-association' and 'no movement'. It has also been stated that the right to life stands on different footing from other rights as all other rights are derivable from the right to live.

The aforesaid criticism is only partially correct inasmuch as though the negative aspect may not be inferable on the analogy of the rights conferred by different clauses of Article 19, one may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has; some thing to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking.

* * *

Keeping in view all the above, we state that right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life.

In this context, reference may be made to what Alan A. Stone, while serving as Professor of Law and Psychiatry in Harvard University stated in his 1987 Jonas Robitscher Memorial Lecture in Law and Psychiatry, under the caption 'The Right to Die: New Problems for Law and Medicine and Psychiatry'. (This lecture has been printed at pp.627 to 643 of ***Emory Law Journal***, Vol.37, 1988). One of the basic theories of the lecture of Professor Stone was that right to die inevitably leads to the right to commit suicide." (emphasis supplied) (Pages 409-410)

21. From the above extract, it is clear that in substance the reason for that view is, that if a person has a right to live, he also has a right not to live. The decisions relied on for taking that view relate to other fundamental rights which deal with different situations and different kind of rights. In those cases the fundamental right is of a positive kind, for example, freedom of speech, freedom of association, freedom of movement, freedom of business etc. which were held to include the negative aspect of there being no compulsion to exercise that right by doing the guaranteed positive act. Those decisions merely held that the right to do an act includes also the right not to do an act in that manner. It does not flow from those decisions that if the right is for protection from any intrusion thereof by others or in other words the right has the negative aspect of not being deprived by others of its continued exercise e.g. the right to life or personal liberty, then the converse positive act also flows there from to permit expressly its discontinuance or extinction by the holder of such right. In those decisions it is the negative

aspect of the right that was invoked for which no positive or overt act was required to be done by implication. This difference in the nature of rights has to be borne in mind when making the comparison for the application of this principle.

22. When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the right to die as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to freedom of speech etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in ***P. Rathinam*** *qua* Article 21.

23. To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The 'right to die', if any, is inherently inconsistent with the 'right to life' as is 'death' with 'life'.

24. Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The right to life' including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the right to die an unnatural death curtailing the natural span of life.

25. A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the

process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life.

26. We are, therefore, unable to concur with the interpretation of Article 21 made in ***P. Rathinam***. The only reason for which Section 309 is held to be violative of Article 21 in ***P. Rathinam*** does not withstand legal scrutiny. We are unable to hold that Section 309 I.P.C. is violative of Article 21.

27. The only surviving question for consideration now is whether Section 309 IPC is violative of Article 14, to support the conclusion reached in ***P.Rathinam***.

28. The basis of the decision in ***P. Rathinam***, discussed above, was not supported by any of the learned counsel except Shri B.S. Malik. On the basis of the decision in ***P.Rathinam*** it was urged that Section 306 also is violative of Article 21, as mentioned earlier. On the view we have taken that Article 21 does not include the right to die' as held in ***P. Rathinam***, the first argument to challenge the constitutional validity of Section 306, IPC also on that basis fails, and is rejected.

Article 14 - Is it violated by Section 309, I.P.C.?

29. We would now consider the constitutional validity of Section 309 with reference to Article 14 of the Constitution. In substance, the argument of Shri Ujagar Singh, Shri B.S. Malik and Shri Soli J. Sobrajee on this point is that it is a monstrous and barbaric provision which violates the equality clause being discriminatory and arbitrary. It was contended that attempted suicide is not punishable in any other civilized society and there is a strong opinion against the retention of such a penal provision which led the Law Commission of India also to recommend its deletion. Shri Sorabjee contended that the wide amplitude of Article 14 together with the right to live with dignity included in Article 21, renders Section 309 unconstitutional. It is in this manner, invoking Article 21 limited to life with dignity (not including therein the right to die) that Shri Sorabjee refers to Article 21 along with Article 14 to assail the validity of Section 309, IPC. The conclusion reached in ***P. Rathinam*** is supported on this ground.

30. We have formed the opinion that there is no merit in the challenge based even on Article 14 of the Constitution. The contention based on Article 14 was rejected in ***P. Rathinam*** also. It was held therein as under:

> The Bombay High Court held Section 309 as violation of Article 14 also mainly because of two reasons. First, which act or acts in series of acts will constitute attempt to suicide, where to draw the line, is not known – some attempts may be serious while others non-serious. It was stated that in fact philosophers, moralists and sociologists were not agreed upon what constituted suicide. The want of plausible definition or even guidelines, made Section 309 arbitrary as per the learned Judges. Another reason given was that Section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made.
>
> *The first of the aforesaid reasons is not sound, according to us, because whatever differences there may be as to what constitutes suicide, there is no doubt that suicide is intentional taking of one's life*, as stated at p.1521 of ***Encyclopaedia of Crime and Justice***, Vol. IV, 1983 Edn. Of course, there still exists difference among suicide researchers as to what constitutes suicidal behavior, for example, whether narcotic addiction, chronic

alcoholism, heavy cigarette smoking, reckless driving, other risk-taking behaviors are suicidal or not. It may also be that different methods are adopted for committing suicide, for example, use of fire-arm, poisoning especially by drugs, overdoses, hanging, inhalation of gas. Even so, suicide is capable of a broad definition, as has been given in the aforesaid ***Webster's Dictionary***. Further, on a prosecution being launched it is always open to an accused to take the plea that his act did not constitute suicide where-upon the court would decide this aspect also.

In so far as treating of different attempts to commit suicide by the same measure is concerned, the same also cannot be regarded as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. It is worth pointing out that Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment. It is this aspect which weighed with the Division Bench of Andhra Pradesh High Court in its aforesaid decision to disagree with the Bombay view by stating that in certain cases even Probation of Offenders Act can be pressed into service, whose Section 12 enables the court to ensure that no stigma or disqualification is attached to such a person. …

We agree with the view taken by the Andhra Pradesh High Court as regards Section 309 qua Article 14. (Page 405) (emphasis supplied)

With respect, we are in agreement with the view so taken *qua* Article 14, in ***P. Rathinam***.

31. We have already stated that the debate on the desirability of retaining such a penal provision of punishing attempted suicide, including the recommendation for its deletion by the Law Commission are not sufficient to indicate that the provision is unconstitutional being violative of Article 14. Even if those facts are to weigh, the severity of the provision is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be the punishment awarded on conviction under Section 309, IPC. This aspect is noticed in ***P. Rathinam*** for holding that Article 14 is not violated.

32. The reported decisions show that even on conviction under Section 309, IPC, in practice the accused has been dealt with compassion by giving benefit under the Probation of Offenders Act, 1958 or Section 562 of the Code of Criminal Procedure, 1908 corresponding to Section 360 of the Criminal Procedure Code, 1973 : ***Barkat* v. *Emperor***, AIR 1934 Lah. 514; ***Emperor* v. *Dwarka Pooja***, 14 Bom.L.R. 146; ***Emperor* v. *Dhirajia***, AIR 1940 All 486; ***Ram Sunder* v. *State of Uttar Pradesh***, AIR 1962 All. 262; ***Valentino* v. *State***, AIR 1967 Goa 138; ***Phulbhai* v. *State of Maharashtra***, 1976 Cr.L.J. 1519; ***Maharani* v. *State of M.P.***, AIR 1981 SC 1776; ***Rukhmina Devi* v. *State of U.P.***, 1988 Cr.L.J. 548. The above quoted discussion in ***P. Rathinam*** *qua* Article 14 is sufficient to reject the challenge based on Article 14.

33. We may briefly refer to the aid of Article 21 sought by Shri Sorabjee to buttress the challenge based on Article 14. We have earlier held that right to die is not included in the `right to life' under Article 21. For the same reason, right to live with human dignity cannot be construed to include within its ambit the right to terminate natural life, at least before commencement of the natural process of certain death. We do not see how Article 21 can be

pressed into service to support the challenge based on Article 14. It cannot, therefore, be accepted that Section 309 is violative either of Article 14 or Article 21 of the Constitution.

34. It follows that there is no ground to hold that Section 309, IPC is constitutionally invalid. The contrary view taken in ***P. Rathinam*** on the basis of the construction made of Article 21 to include therein the right to die cannot be accepted by us to be correct. That decision cannot be supported even on the basis of Article 14. It follows that Section 309, IPC is not to be treated as unconstitutional for any reason.

Validity of Section 306 I.P.C.

35. The question now is whether Section 306, IPC is unconstitutional for any other reason. In our opinion, the challenge to the constitutional validity of Section 309, IPC having been rejected, no serious challenge to the constitutional validity of Section 306 survives. We have already rejected the main challenge based on P. Rathinam on the ground that 'right to die' is included in Article 21.

36. It is significant that Section 306 enacts a distinct offence which is capable of existence independent of Section 309, IPC. Sections 306 and 309 read as under:

> 306. *Abetment of suicide* - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
>
> 309. *Attempt to commit suicide* - Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

37. Section 306 prescribes punishment for abetment of suicide while Section 309 punishes attempt to commit suicide. Abetment of attempt to commit suicide is outside the purview of Section 306 and it is punishable only under Section 309 read with Section 107, IPC. In certain other jurisdictions, even though attempt to commit suicide is not a penal offence yet the abettor is made punishable. The provision there provides for the punishment of abetment of suicide as well as abetment of attempt to commit suicide. Thus, even where the punishment for attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society. Such a provision is considered desirable to also prevent the danger inherent in the absence of such a penal provision. The arguments which are advanced to support the plea for not punishing the person who attempts to commit suicide do not avail for the benefit of another person assisting in the commission of suicide or in its attempt. This plea was strongly advanced by the learned Attorney General as well as the *amicus curiae* Shri Nariman and Shri Sorabjee. We find great force in the submission.

38. The abettor is viewed differently, inasmuch as he abets the extinguishment of life of another persons and punishment of abetment is considered necessary to prevent abuse of the absence of such a penal provision. The Suicide Act, 1961 in the English Law contains the relevant provisions as under:

> 1. *Suicide to cease to be a crime*. – The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.

NOTE

Suicide. "*Felo de se* or suicide is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison or any other way" and was a felony at common law: see 1 Hale PC 411-419, This section abrogates that rule of law, *but, by virtue of s 2(1) Post, a person who aids abets, counsels or procures the suicide or attempted suicide of another is guilty of a statutory offence*.

The requirement that satisfactory evidence of suicidal intent is always necessary to establish suicide as a cause of death is not altered by the passing of this Act : see *R.* v. *Cardiff Coroner, ex p Thomas* [1970] 3 All ER 469, [1970] 1 WLR 1475.

2. *Criminal liability for complicity in another's suicide*. – (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years." (emphasis supplied)

39. This distinction is well recognized and is brought out in certain decisions of other countries. The Supreme Court of Canada in ***Rodriguez* v. *B.C. (A.G.)*** [107 D.L.R. (4th Series) 342] states as under:

> Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives. (at page 389)

40. ***Airedale N.H.A. Trust* v. *Bland*** [1993 (2) W.L.R. 316 (H.L.)] was a case relating to withdrawal of artificial measures for continuance of life by a physician. Even though it is not necessary to deal with physician assisted suicide or euthanasia cases, a brief reference to this decision cited at the Bar may be made. In the context of existence in the persistent vegetative state of no benefit to the patient, the principle of sanctity of life, which it is the concern of the State, was stated to be not an absolute one. In such cases also, the existing crucial distinction between cases in which a physician decides not to provide, or to continue to provide, for his patient, treatment or care which could or might prolong his life, and those in which he decides, for example, by administering a lethal drug, actively to bring his patient's life to an end, was indicated and it was then stated as under: (All ER p.867: WLR p.368)

> But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be [see ***R.* v. *Cox*** (unreported), 18 September, 1992] per Ognall, J. in the Crown Court at Winchester. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia -actively causing his death to avoid or to end his suffering. *Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law. and can, if enacted, ensure that such legalized killing can only be carried out subject to appropriate supervision and control*.... .(emphasis supplied) (at page 368)

41. The desirability of bringing about such a change was considered to be the function of the legislature by enacting a suitable law providing therein adequate safeguards to prevent any possible abuse.

42. The decision of the United States Court of Appeals for the Ninth Circuit in ***Compassion in Dying*** **v.** ***State of Washington*** [49 F.3d 586] which reversed the decision of United States District Court. W.D. Washington reported in 850 Federal Supplement 1454, has also relevance. The constitutional validity of the State statute that banned physician assisted suicide by mentally competent terminally ill adults was in question. The District Court held unconstitutional the provision punishing for promoting a suicide attempt. On appeal. that judgment was reversed and the constitutional validity of the provision was upheld.

43. This caution even in cases of physician assisted suicide is sufficient to indicate that assisted suicides outside that category have no rational basis to claim exclusion of the fundamental of sanctity of life. The reasons assigned for attacking a provision which penalizes attempted suicide are not available to the abettor of suicide or attempted suicide. Abetment of suicide or attempted suicide is a distinct offence which is found enacted even in the law of the countries where attempted suicide is not made punishable. Section 306 I.P.C. enacts a distinct offence which can survive independent of Section 309 in the I.P.C. The learned Attorney General as well as both the learned *amicus curiae* rightly supported the constitutional validity of Section 306 I.P.C.

44. The Bombay High Court in ***Naresh Marotrao Sakbre*** **v.** ***Union of India*** [1895 Crl.L.J. 96] considered the question of validity of Section 306 I.P.C. and upheld the same. No decision holding Section 306 I.P.C. to be unconstitutional has been cited before us. We find no reason to hold either Section 309 or Section 306 I.P.C. to be unconstitutional.

45. For the reasons we have given, the decisions of the Bombay High Court in ***Maruti Shripati Dubal*** **v.** ***State of Maharashtra*** [1987 Crl. L.J. 743] and of a Division Bench of this Court in ***P. Rathinam***, wherein Section 309 I.P.C. has been held to be unconstitutional, are not correct. The conclusion of the Andhra Pradesh High Court in ***Chenna Jagadeeswar*** **v.** ***State of Andhra Pradesh*** [1988 Crl.L.J. 549] that Section 309 I.P.C. is not violative of either Article 14 or Article 21 of the Constitution is approved for the reasons given herein. The questions of constitutional validity of Sections 306 and 309 I.P.C. are decided accordingly, by holding that neither of the two provisions is constitutionally invalid.

46. These appeals would now be listed before the appropriate Division Bench for their decision on merits in accordance with law treating Sections 306 and 309 I.P.C. to be constitutionally valid.

* * * * *

Suresh *v.* State of U.P.

(2001) 3 SCC 673

THOMAS, J. - Section 34 of the Indian Penal Code is a very commonly invoked provision in criminal cases. With a plethora of judicial decisions rendered on the subject the contours of its ambit seem well-nigh delineated. Nonetheless, when these appeals were heard a two-Judge Bench felt the need to take a re-look at the provision as to whether and if so to what extent it can be invoked as an aid in this case. Hence these appeals were heard by a larger Bench.

2. In one of the appeals A-1 Suresh and his brother-in-law, A-2 Ramji, are fighting their last chance to get extricated from the death penalty imposed on them by a Session Court which was confirmed by a Division Bench of the High Court. In the other appeal Pavitri Devi, the wife of A-1 Suresh (also sister of A-2 Ramji) is struggling to sustain the acquittal secured by her from the High Court in reversal of the conviction for murder ordered by the Sessions Court with the aid of Section 34 IPC.

3. On the night of 5-10-1996 when Ramesh (brother of the appellant Suresh) and his wife and children went to bed as usual, they would have had no foreboding that it was going to be the last night they were sleeping on this terrestrial terrain. But after they, in their sleep, crossed the midnight line and when the half crescent moon appeared with its waned glow above their house, the night turned red by the bloodiest killing spree befallen on the entire family. The motley population of that small house was hacked to pieces by armed assailants, leaving none, but a single tiny tot, alive. The sole survivor of the gory carnage could have seen what happened inside his sweet home only in the night which itself turned carmine. He narrated the tale before the Sessions Court with the visible scars of the wounds he sustained on his person.

4. That infant witness (PW 3 Jitendra) told the trial court that he saw his uncle (A-1 Suresh) in the company of his brother-in-law (A-2 Ramji) acting like demons, cutting the sleeping children with axe and chopper. He also said that his aunt (A-3 Pavitri Devi) clutched the tuft of his mother's hair and yelled like a demoness in thirst for the blood of the entire family.

5. Lalji (PW 1), the uncle of the decreased Ramesh (who is uncle of A-1 Suresh also) and Amar Singh (PW 2) a neighbour gave evidence supporting the version of PW 3 Jitendra. But the said two witnesses did not attribute any overt act to Pavitri Devi except saying that she too was present near the scene of occurrence. The house of the accused was situated not for away from the scene of occurrence, but across the road which abuts the house of the decreased.

6. The doctor (PW 5 C.M. Tiwari) who conducted the autopsy on the dead bodies of all the deceased described the horrifying picture of the mauled bodies. The youngest of the victims was one-year-old child whose skull was cut into two and the brain was torn as under. The next was a three-year-old male child who was killed with his neck axed and the spinal cord, trachea and the larynx were snipped. The next in line was PW 3 Jitendra – a seven year old child. (His injuries can be separately stated). His immediate next elder was Monisha-a nine-year-old female child, who too was axed on the neck, mouth and chest with her spinal cord cut into two.

7. The mother of those little children, Ganga Devi, was inflicted six injuries which resulted in her skull being broken into pieces. The last was Ramesh – the bread-winner of the

family, who was the father of the children. Four wounds were inflicted on him. All of them were on the neck and above that. The injuries on Ramesh, when put together, neared just short of decapitation.

8. PW 3 Jitendra had three incised wounds on the scapular region, but the doctor who attended on him (PW 6 S.K. Verma) did not probe into the depth of one of them, presumably because of the fear that he might require an immediate surgical intervention. However, he was not destined to die and hence the injuries on him did not turn fatal.

9. The motive for the above dastardly massacre was the greed for a bit of land lying adjacent to the house compound of the deceased which A-I Suresh claimed to be his. But the deceased Ramesh clung to that land and it resulted in burgeoning animosity in the mind of Suresh which eventually grew alarmingly wild.

10. The evidence of PW 1 Lalji and PW 2 Amar Singh was considered by the Sessions Court in the light of various contentions raised by the counsel for the accused. The trial Judge found the said evidence reliable. The Division bench of the High Court considered the said evidence over again and they did not see any reason to dissent from the finding made by the trail court: The evidence of PW 3 Jitendra, the sole survivor of the carnage, was evaluated with greater care as he was an infant of seven years. Learned Judges of the Division Bench of the High Court accepted the evidence of PW 3 only to the extent it secured corroboration from the testimony of P.Ws 1 and 2.

11. Though Mr. K.B. Sinha, learned Senior Counsel made an endeavour to make some tears into the fabric of the testimony of P.Ws 1 and 2, he failed to satisfy us that there is any infirmity in the findings recorded by the two courts regarding the reliability of the evidence of those two witnesses. As the learned Senior Counsel found it difficult to turn the table regarding the evidence against the accused which is formidable as well as trustworthy, he focused on two aspects. First is that acquittal of Pavitri Devi does not warrant interference from this court. Second is that this is not a case belonging to the category which compels the Court to award death penalty to the two appellants, Suresh and Ramji.

12. We will now deal with the role played by Pavitri Devi to see whether the Court can interfere with the acquittal order passed in her favour by the High Court. P.W. 3 said that while he was sleeping the blood gushed out of the wounds sustained by his father reached his mouth and when he woke up he saw the incident. According to him, Pavitri Devi caught hold of his mother's hair and pulled her up, thereafter she went outside and exhorted that everybody should be killed. But P.Ws 1 and 2 did not support the aforesaid version pertaining to Pavitri Devi. According to them, when they reached the scene of occurrence Pavitri Devi was standing in front of the house of the deceased while the other two were inside the house engaged in the act of inflicting blows on the victims.

13. The position which the prosecution succeeded in establishing against A-3 Pavitri Devi is that she was also present at the scene of occurrence. Learned counsel for the State contended that such presence was in furtherance of the common intention of the three accused to commit the murders and hence she can as well be convicted for the murders under Section 302 IPC with the aid of Section 34 IPC. Mr. K.B. Sinha, learned counsel contended that if Section 34 IPC is

to be invoked against Pavitri Devi the prosecution should have established that she had done some overt act in furtherance of the common intention.

14. We heard arguments at length on the ambit of Section 34 IPC. We have to consider whether the accused who is sought to be convicted with the aid of that section, should have done some act, even assuming that the said accused also shared the common intention with the other accused.

15. Section 34 reads thus:

> *34.Acts done by several persons in furtherance of common intention:* When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

16. As the section speaks of doing "a criminal act by several persons" we have to look at Section 33 IPC which defines the "Act". As per it, the word "act" denotes as well a series of acts as a single act. This means a criminal act can be a single act or it can be the conglomeration of a series of acts. How can a criminal act be done by several persons?

17. In this context, a reference to Sections 35, 37 and 38 IPC, in juxtaposition with Section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with *mens rea* is liable for the act "in the same manner as if the act were done by him alone with that knowledge or intention". The section differs from Section 34 only regarding one postulate. In the place of common intention of all such person (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required *men rea.*

18. Section 37 deals with the commission of an offence "by means of several acts". The section renders anyone who intentionally co-operates in the commission of that offence "by doing any one of those acts" to be liable for that offence. Section 38 also shows another facet of one criminal act being done by several persons without connecting the common bond i.e., "in furtherance of the common intention of all". In such a case, they would be guilty of different offence or offences but not for the same offence.

19. Hence, under Section 34, one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.

20. To understand the section better, it is useful to recast it in a different form by way of an illustration. This would highlight the difference when several persons do not participate in the crime committed by only one person even though there was common intention of all the several persons. Suppose, a section was drafted like this: "When a criminal act is done by one person in furtherance of the common intention of several persons, each of such several persons is liable for that act in the same manner as if it were done by all such persons."

21. Obviously Section 34 is not meant to cover a situation which may fall within the fictiously concocted section caricatured above. In that concocted provision, the co-accused need not do anything because the act done by the principal accused would nail the co-accused

also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

22. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g., the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that they can be used to inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons, in furtherance of the common intention overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessary be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g., a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

25. There may be other provisions in the IPC like Section 120-B or Section 109 which could then be invoked to catch such non-participating accused. Thus participation in the crime in furtherance of the common intention is a *sine qua non* Section 34 IPC. Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

26. A Division Bench of the Madras High Court has said as early as in 1923 that "evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required to justify the application on Section 34 IPC." (vide ***Aydroos* v. *Emperor*** AIR 1923 Mad. 187).

27. In ***Barendra Kumar Ghosh* v. *King Emperor*** the Judicial Committee after referring to the cognate provision adverted to above, held thus:

> Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable, for the result of them all, as if he had done them himself, for that act" and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it.

28. We have come across the observations made by another Judicial Committee of the Privy Council of equal strength in ***Mahbub Shah* v. *Emperor***. The observation is that Section 34 IPC can be invoked if it is shown that the criminal act was done by one of the accused in furtherance of the common intention of all. On the fact situation their Lordships did not have to consider the other component of the section. Hence the said observation cannot be understood to have obviated the necessity of proving that "the criminal act was done by several persons" which is a component of Section 34 IPC.

29. In ***Pandurang* v. *State of Hyderabad*,** Vivian Bose. J., speaking for a three-Judge bench of this court focused on the second component in Section 34 IPC i.e., "furtherance of the common intention". There was no need for the Bench to consider about the acts committed by the accused charged, in order to ascertain whether all the accused committed the criminal act involved therein. In other words, the first postulate was not a question which came up for consideration in the case. Hence the said decision, cited by both sides for supporting their respective contention, is not of much use in the case.

30. Mr. Pramod Swarup, learned counsel for the State invited our attention to the decision of this Court in ***State of U.P.* v. *Iftikhar Khan*** [(1973) 1 SCC 512] in which it was observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In that case, four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When an argument was made on behalf of those two persons who were armed with lathis, that they did not do any overt act, this Court made the above observation. From the facts of that case, it can be said that there was no act on behalf of the two lathi holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence, the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts.

31. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused. In the present case, the FIR shows that A-

3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road on hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

32. Mr. Pramod Swarup, learned counsel for the State contented that if she remained at the scene without sharing the common intention, she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with the others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased.

33. Thus we are unable to hold that Pavitri Devi shared common intention with the other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34 IPC.

34. Mr. K.B. Singh, learned Senior Counsel made an all out effort to save the convicted appellants from death penalty. The trial court and the High Court have given very cogent reasons and quite elaborately for choosing the extreme penalty. Knowing fully well that death penalty is now restricted to the rarest of rare cases in which the lesser alternative is unquestionably foreclosed as held by the Constitution Bench in ***Bachan Singh* v. *State of Punjab*** [(1980) 2 SCC 684] we could not persuade ourselves in holding that the acts committed by A-1 Suresh and A-2 Ramji should be pulled out of contours of the extremely limited sphere. Mr. K.B. Sinha cited a number of decisions including ***Panchhi* v. *State of U.P.*** [(1998) 7 SCC 177] in an endeavour to show that this Court had chosen to give the alternative sentence inspite of the ferocity of the acts comparable with the facts in this case. Even after bestowing our anxious consideration, we cannot persuade ourselves to hold that this is not a rarest of rare cases in which the lesser alternative is unquestionably foreclosed.

35. Accordingly, we dismiss both the appeals.

SETHI, J. (*for himself and Agrawal, J.*)(*Concurring*)- We agree with the conclusions arrived at by Brother Thomas, J. in his lucid judgment.

37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused having such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It

is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in action resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate done criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in ***Shatrughan Patar*** v. ***Emperor*** [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In ***Barendra Kumar Ghosh*** v. ***King Emperor*** [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

> The words of Section.34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omissions to act, for example, *an omission to interfere in order to prevent a murder being done before one's very eyes.* By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. *Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and*

wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar of diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, *whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other*. (Emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

As to S.114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; *Abhi Misser* v. *Lachmi Narain* [ILR (1900) 27 Cal.566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. *Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by* Section *114 brings the case within the ambit of* Section *34.* (Emphasis supplied)

42. The classic case on the subject is the judgment of the Privy Council in ***Mahboob Shah*** **v.** ***Emperor*** [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:

When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.

It was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. *To invoke the aid of* Section *34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the*

common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were one by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. (Emphasis supplied)

43. A Full Bench of the Patna High Court in ***King Emperor*** **v**. ***Barendra Kumar Ghose*** [AIR 1924 Cal. 257] which was later approved by the Privy Council, dealt with the scope of Section 34 *in extenso* and noted its effects from all possible interpretations put by various High Courts in the country and the distinguished authors on the subject. The Court did not agree with the limited construction given by Stephen, J. in ***Emperor*** **v.** ***Nirmal Kanta Roy*** [ILR (1914) 41 Cal.1072] and held that such an interpretation, if accepted, would lead to disastrous results. Concurring with Mookerjee, J., and giving the section a wider view, Richardson, J. observed:

> It appears to me that Section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In ***R.*** **v.** ***Salmon*** [1880 (6) QBD 79] three men had been negligently firing at a mark. One of them - it was not known which - had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J., said: 'The death resulted from the action of the three and they are all liable'. Stephen, J. said: 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatsoever to prevent danger.
>
> Moreover, Sections 34, 35 and 37 must be read together, and the use in section 35 of the phrase 'each of such persons who joins in the act' and in Section 37 of the phrase, 'doing any one of those acts, either singly or jointly with any other person' indicates the true meaning of Section 34. So section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different mode of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.
>
> To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.
>
> This view of Section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere.

44. Approving the judgments of the Privy Council in ***Barendra Kumar Ghose*** and ***Mahboob Shah's*** cases (*supra*) a three Judge Bench of this Court in ***Pandurang*** **v.** ***State of Hyderabad*** [AIR 1955 SC 216] held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence

of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

45. In ***Shreekantiah Ramayya Munipalli*** **v.** ***State of Bombay*** [AIR 1955 SC 287] this Court held:

> It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, *can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all* and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.(Emphasis supplied)

46. This Court again in ***Tukaram Ganapat Pandare*** **v.** ***State of Maharashtra*** [AIR 1974 SC 514] reiterated that Section 34 lays down the rule of joint responsibility for criminal act performed by a plurality of persons and even mere distance from the scene of crime cannot exclude the culpability of the offence. "Criminal sharing, overt or covert, by active presence or by distant direction making out a certain measure of jointness in the commission of the act is the essence of Section 34".

47. In a case where the deceased was murdered by one of the two accused with a sharp edged weapon at 10.30 p.m. while he was sleeping on a cot in his house while the other accused, his brother, without taking part stood by with a spear in his hand to overcome any outside interference with the attainment of the criminal act and both the accused ran away together after the murder, this Court in ***Lalai*** **v.** ***State of U.P.*** [AIR 1974 SC 2118] held that these facts had a sufficient bearing on the existence of a common intention to murder.

48. In ***Ramaswami Ayyangar*** **v.** ***State of Tamil Nadu*** [AIR 1976 SC 2027] this Court declared that Section 34 is to be read along with preceding Section 33 which makes it clear that the "act" mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In ***Ramaswami's*** case (*supra*) it was contended that

A-2 could not be held vicariously liable with the aid of Section 34 for the act of other accused on the grounds: firstly, he did not physically participate in the fatal beating administered by co-accused to the deceased and thus the "criminal act" of murder was not done by all the accused within the contemplation of Section 34; and secondly, the prosecution had not shown that the act of A-2 in beating P.W. was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result. Conviction of A-2 under Section 302/34 of the Code in that case was upheld.

49. In ***Rambilas Singh*** **v.** ***State of Bihar*** [AIR 1989 SC 1593] this Court held:

> It is true that in order to convict persons vicariously under S.34 or S.149 IPC, it is not necessary to prove that each and everyone of them had indulged in over acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly.(Emphasis supplied)

50. Again a three Judge Bench of this Court in ***State of U.P.*** **v.** ***Iftikhar Khan*** [1973 (1) SCC 512] after relying upon the host of judgments of Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four accused persons were residents of the same village and accused Nos.1 and 3 were brothers who were bitterly inimical to the deceased and accused Nos.2 and 4 were their close friends, accused Nos.3 and 4 had accompanied the other two accused who were armed with pistols; all the four came together in a body and ran away in a body after the crime coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and pre-arrangement which proved that the "criminal act" was done by all the accused persons in furtherance of their common intention.

51. In ***Krishnan*** **v.** ***State of Kerala*** [JT 1996 (7) SC 612] this Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Penal Code holding:

> 15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service Section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied

when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*.

52. In ***Surender Chauhan* v. *State of M.P.*** [(2000) 4 SCC 110] this Court held that apart from the fact that there should be two or more accused, two factors must be established - (i)common intention and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment this Court held:

> 11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them (***Ramaswami Ayyangar* v. *State of T.N.***, 1976 (3) SCC 779). The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence (***Rajesh Govind Jagesha* v. *State of Maharashtra,*** 1999 (8) SCC 428). To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established" (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.

53. For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial is also not to be lost sight of. The common intention implies a pre-arranged plan but in a given case it may develop at the spur of the moment in the course of the commission of the offence. Such common intention which developed at the spur of the moment is different from the similar intention actuated by a number of persons at the same time. The distinction between "common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice.

54. After referring to ***Mahboob Shah's*** case (*supra*) this Court in ***Mohan Singh* v. *State of Punjab*** [AIR 1963 174] observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the

"criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object, Section 34 of the Code deals with persons having common intention to do a criminal act.

56. However, in this case on facts, the prosecution has not succeeded in proving that A3 Pavitri Devi shared the common intention with the other two accused persons, one of whom was her husband and the other her brother. It has come in evidence that when the witnesses reached on the spot, they found the said accused standing on the road whereas the other accused were busy committing the crime inside the house. The exaggerated version of PW3 regarding the participation of Pavitri Devi by allegedly catching hold of his mother's hair cannot be accepted as P.Ws 1 and 2 have not supported the aforesaid version. The High Court was, therefore, justified in holding that Pavitri Devi, A3 did not share the common intention with the other accused persons. By her mere presence near the place of occurrence at or about the time of crime in the absence of other evidence, direct or circumstantial, cannot hold her guilty with the aid of Section 34. But in case the prosecution had succeeded in proving on facts of her sharing of common intention with A1 and A2, she could not be acquitted of the charge framed against her only on the ground that she had actually not done any overt act. The appeal of the State filed against Pavitri Devi has no merit and has thus rightly been dismissed by Brother Thomas, J.

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Maina Singh v. *State of Rajasthan*

(1976) 2 SCC 827: AIR 1976 SC 1084

P.N. SHINGHAL, J. - This appeal of Maina Singh arises out of the judgment of the Rajasthan High Court dated April 21, 1971 upholding the trial Court's judgment convicting him of an offence under Section 302 read with Section 34 I.P.C. for causing the death of Amar Singh and of an offence under Section 326 I.P.C. for causing grievous injuries to Amar Singh's son Ajeet Singh (PW 2), and sentencing him to imprisonment for life for the offence of murder and to rigorous imprisonment for three years and a fine of Rs 100 for the other offence.

2. The deceased Amar Singh and accused Maina Singh and his three sons Hardeep Singh, Jeet Singh and Puran Singh used to live in 'chak' No. 77 GB, in Ganganagar district of Rajasthan while Narain Singh used to live in another 'chak'. It was alleged that the relations between Amar Singh and Maina Singh were strained, as Maina Singh suspected that Amar Singh was giving information about his smuggling activities. Amar Singh was having some construction work done in his house and had engaged Isar Ram (PW 3) as a mason. On June 29, 1967, at about sunset, the deceased Amar Singh, his son Ajeet Singh (PW 2) and Isar Ram (PW 3) went to the '*diggi'* in '*murabba'* 35 for bath. Ajeet Singh took his bath, and was changing his clothes and Isar Ram was nearby. Amar Singh was cleaning his 'lota' after attending the call of nature. It is alleged that at that time Maina Singh and his three sons Hardeep Singli, Jeel Singh and Puran Singh came to the '*diggi'* along with Narain Singh. Maina "Singh was armed with a 12 bore gun, Puran Singh with a 'takua' and the other three with 'gandasis'. Maina Singh fired at Amar Singh, but could not hit him. The gunshots however hit Ajeet Singh (PW 2) on his legs and he jumped into a dry watercourse which was nearby to take cover. Maina Singh fired again, but without success. Amar Singh ran towards the sugarcane field crying for help but was chased by the accused. Ajeet Singh thereupon ran towards 'chak' No. 78 GB and ultimately went and lodged a report at police station Anoopgarh at 10 p.m. after covering a distance of about six miles. The five accused however followed Amar Singh. Maina Singh fired his gun at Amar Singh and he fell down. The other accused went near him and gave 'gandasi' blows, and Maina Singh gave a blow or two with. the butt end of his gun which broke and the broken pieces fell down. Amar Singh succumbed to his injuries on the spot, and the accused ran away.

3. On the report of Ajeet Singh about the incident which took place by the time he left for the police station, the police registered a case for an offence under Section 307 read with Section 149 I.P.C. and started investigation. The body of Amar Singh was sent for post-mortem examination. The report Ex. P-9 of Dr Shanker Lal (PW 5) is on the record. The injuries of Ajeet Singh (PW 2) were also examined by Dr Shanker Lal and his report in that connection is Ex. P-10. It was found that there were several gunshot injuries, incised wounds and lacerated wounds on the body of the deceased, and there were as many as 12 gunshot wounds on the person of Ajeet Singh (PW 2). All the five accused were found absconding and could be taken into custody after proceedings were started against them under Sections 87 and 88 Cr. P.C. Maina Singh held a licence for gun Ex. 23 and led to its recovery during the course of the investigation vide memorandum Ex. P-43. At that time, its butt was found to be missing. Its

broken pieces had however been recovered by the investigating officer earlier, along with .the empty cartridges.

4. The prosecution examined Ajeet Singh (PW 2), Isar Ram (PW 3) and Smt. Jangir Kaur (PW 7) the wife of the deceased as eyewitnesses of the incident. The accused denied the allegation of the prosecution altogether, but Maina Singh admitted that the gun belonged to him and he held a licence for it. The Sessions Judge disbelieved the evidence of Smt. Jangir Kaur (PW 7) mainly for the reason that her name had not been mentioned in the first information report. He took the view that the statements of Ajeet Singh (PW 2) and Isar Ram (PW 3) were inconsistent regarding the part played by Hardeep Singh, Jeet Singh, Narain Singh and Puran Singh accused, and although he held that one or more of the accused persons, besides Maina Singh, might be responsible for causing injuries to the deceased, along with Maina Singh, he held further that it could not be ascertained which one of the accused was with him. He also took the view that "someone else might have been with him" and he therefore gave the benefit of doubt to accused Hardeep Singh, Jeet Singh, Puran Singh and Narain Singh and acquitted them. As the statements of Ajeet Singh (PW 2) and Isar Ram (PW 3) were found to be consistent against appellant Maina Singh, and as there was circumstantial evidence in the shape of the recovery of empty cartridges near the dead body and gun (Ex. 23), as well as the medical evidence, and the fact that the accused had absconded, the learned Sessions Judge convicted and sentenced him as aforesaid.

5. An appeal was preferred by the State against the acquittal of the remaining four accused, and Maina Singh also filed an appeal against his conviction. The High Court dismissed both the appeals and maintained the conviction and sentence of Maina Singh as aforesaid.

6. Mr. Harbans Singh appearing on behalf of appellant Maina Singh has not been able to challenge the evidence on which appellant Maina Singh has been convicted, but he has raised the substantial argument that he could not have been convicted of the offence of murder under Section 302 read with Section 34 I.P.C. when the four co-accused had been acquitted and the Sessions Judge had found that it was not possible to record a conviction under Section 302 read with Section 149 I.P.C. or Section 148 I.P.C. It has been argued that when the other four accused were given the benefit of doubt and were acquitted, it could not be held, in law, that they formed an unlawful assembly or that any offence was committed by appellant Maina Singh in prosecution of the common object of that assembly. It has been argued further that, *a fortiori,* it was not permissible for the court of sessions or the High Court to take the view that a criminal act was done by appellant Maina Singh in furtherance of the common intention of the "other accused" when those accused had been named to be no other than Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh who had all been acquitted. It has therefore been argued that all that was permissible for the High Court was to convict appellant Maina Singh of any offence which he might have committed in his individual capacity, without reference to the participation of any other person in. the crime. On the other hand, it has been argued by Mr. S. M. Jain that as the learned Sessions Judge had acquitted the remaining four accused by giving them the benefit of doubt, and had recorded the finding that one or more of the accused persons or some other person might have participated in the crime along with Maina Singh, the High Court was quite justified in upholding the conviction of the appellant Maina Singh of an offence under Section 302/34 I.P.C.

7. The relevant portion of the judgment of the trial Court, which bears on the controversy and has been extracted with approval in the impugned judgment of the High Court, is as follows:

> The injuries found on the person of the deceased Amar Singh were with firearm, blunt as well as sharp weapon. The firearm injuries and the blunt weapon injuries have been assigned to Maina Singh and so there must have been other person also along with Maina Singh in causing injuries to the deceased. It can be so inferred from the statements of Isar Ram and Ajeet Singh also. These facts could no doubt create a strong suspicion that one or more of the accused persons might be responsible along with Maina Singh in causing injuries to the deceased. In view of the statement of Isar Ram and Ajeet Singh it cannot however be ascertained which one of the accused was with Maina Singh and it was also possible that someone else might have been with him. In such a case the prosecution version against these four accused persons arc not proved beyond doubt. They arc therefore not guilty of the offence with which they have been charged.

It would thus appear that the view which has found favour with *the* High Court is that as there were injuries with firearm and with blunt and sharp-edged weapons, and as the firearm and the blunt weapon injuries had been ascribed to Maina Singh, there must have been one other person with him in causing the injuries to the deceased. At the same time, it has been held further that these facts could only create a strong suspicion "that one or more of the accused persons might be responsible along with Maina Singh in causing the injuries to the deceased", but it could not be ascertained which one of the accused was with him and that it was also possible that "someone else might have been with him". The finding therefore is that the other person might have been one of the other accused or someone else, and not that the other associate in the crime was a person other than the accused. Thus the finding is not categorical and does not exclude the possibility of infliction of the injuries in furtherance of the common intention of one of the acquitted accused and the appellant.

8. Another significant fact which bears on the argument of Mr. Harbans Singh is that while in the original charge-sheet the Sessions Judge specifically named appellant Maina Singh and the other accused Hardeep Singh, Puran Singh, Jeet Singh and Narain Singh as forming an unlawful assembly and for causing the death of Amar Singh in furtherance of the common object of that assembly, he altered that charge but retained, at the same time, the charge that Maina Singh formed an unlawful assembly along with the "other accused" with the common object of murdering Amar Singh and intentionally caused injuries to him along with "the other accused" in prosecution of that common object. In this case therefore Maina Singh and the other four accused were alleged, all along, to have participated in the crime and were named in the chargesheet as the perpetrators of the crime without there being an allegation that some other person (besides the accused) took part in it in any manner whatsoever. It was in fact the case from the very beginning, including the first information report, that the offence was committed by all the five named accused, and even the evidence of the prosecution was confined to them all through and to no other person. The question is whether the High Court was right in upholding the conviction of the appellant with reference to Section 34 I.P.C. in these circumstances?

9. Such a question came up for consideration in this Court on earlier occasions, and we shall refer to some of those decisions in order to appreciate the argument of Mr. Jain that the

decision in ***Dharam Pal*** **v.** ***State of U. P.*** [(1975) 2 SCC 596] expresses the latest view of this Court and would justify the appellant's conviction by invoking Section 34 I.P.C.

10. We may start by making a reference to ***King*** **v.** ***PIummer*** [(1902) 2 KB 339] which, as we shall show has been cited with approval by this Court in some of its decisions. That was a case where there was a trial of an indictment charging three persons jointly with conspiring together. One of them pleaded guilty, and a judgment was passed against him and the other two were acquitted. It was alleged that the judgment passed against the one who pleaded guilty was bad and could not stand. Lord Justice Wright held that there was much authority to the effect that if there was acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant, if he had not pleaded guilty, because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him. In taking that view he made a reference to ***Harrison*** **v.** ***Errington*** [(1627) Popham, 202] whereupon an indictment of three for riot two were found not guilty and one guilty, and upon error brought it was held a "void verdict". Bruce, J. who was the other judge in the case made a reference to the following statement in **Chitty's** ***Criminal Law*** while agreeing with the view taken by Wright, J.:

> And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him.

11. This Court approved ***Plummer's*** case in its decision in ***Topandas*** **v.** ***State of Bombay*** [AIR 1956 SC 33]. That was a case where four named individuals were charged with having committed an offence under Section 120-B I.P.C. and three out of those four were acquitted. This Court held that the remaining accused could not be convicted of the offence as his alleged co-participators had been acquitted, for that would be clearly illegal.

12. A similar point came up for consideration in ***Mohan Singh*** **v.** ***State of Punjab*** [AIR 1963 SC 174]. There two of the five persons who were tried together were acquitted while two were convicted under Section 302 read with Section 149 and Section 147 I.P.C. In the charge those five accused persons and none others were mentioned as forming the unlawful assembly and the evidence led in the case was confined to them. The proved facts showed that the two appellants and the other convicted person, who inflicted the fatal blow, were actuated by common intention of fatally assaulting the deceased. While examining the question of their liability, it was observed as follows:

> Cases may also arise where in the charge the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were

others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the court of facts is liable to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.

13. The other case to which we may make a reference is ***Krishna Govind Patil*** **v.** ***State of Maharashtra*** [AIR 1963 SC 1413]. It noticed and upheld the earlier decision in ***Mohan Singh's*** case and after referring to the portion which we have extracted, it was held as follows:

> It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only the said accused; but there may be other evidence, such as that given by the court witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence.

14. It would thus appear that even if, in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise.

15. The decision in ***Krishna Govind Patil's*** case was followed by the decision in ***Ram Bilas Singh*** **v.** ***State of Bihar*** [(1964) 1 SCR 775]. After noticing and approving the view taken in ***Plummer's*** case and the decisions in ***Mohan Singh's*** case and ***Krishna Govind Patil's*** case this Court stated the law once again as follows:

> The decisions of this Court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is to the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could, not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of Section 149 I. P. C. provided it comes to the conclusion that five or more persons participated in the incident.

16. The other decision to which our attention has been invited is ***Yashwant*** **v.** ***State of Maharashtra*** [(1972) 3 SCC 639]. The decision in ***Krishna Govind Patil*** was cited there on behalf of the appellant and, while referring to the view expressed there, it was observed that in the case before the court there was evidence that the man who used the axe on Sukal was a man who looked like appellant Brahmanand Tiwari, and could be that accused himself. But, as the Court was not satisfied that the identity of the person who used the axe on Sukal was satisfactorily established, as that of Brahmanand Tiwari, it took the view that the remaining accused could be convicted with the aid of Section 34 for the offences committed by them. This

Court did not therefore disagree with the view taken in ***Krishna Govind Patil's*** case, but purported to follow it in its decision and took the aforesaid view in regard to the identity of Brahmanand Tiwari for the purpose of distinguishing it from the case of ***Krishna Govind Patil*** where there was not a single observation in the judgment to indicate that persons other than the named accused participated in the offence and there was no evidence also in that regard.

17. The matter once again came up for consideration in ***Sukh Ram*** **v.** ***State of U. P.*** [(1974) 3 SCC 656]. The Court referred to its earlier decisions including those in ***Mohan Singh's*** case and ***Krishna Govind Patil's*** case and. while distinguishing them on facts, it observed that as the prosecution did not put forward a case of the commission of crime by one known person and one or two unknown persons as in ***Sukh Ram's*** case, and there was no evidence to the effect that the named accused had committed the crime with one or more other persons, the acquittal of the other two accused raised no bar to the conviction of the appellant under Section 302 read with Section 34 I.P.C. The decision in ***Sukh Ram's*** case cannot therefore be said to lay down a contrary view for it has upheld the view taken in the earlier decisions of this Court.

18. That leaves the case of ***Dharam Pal*** **v.** ***State of U. P.*** for consideration. In that case four accused were tried with fourteen others for rioting. The trial Court gave benefit of doubt to eleven of them, and acquitted them. The remaining seven were convicted for the offence under Section 302/149 1. P. C. and other offences. The High Court gave benefit of doubt to four of them, and held that at least four of the accused participated in the crime because of their admission and the injuries. On appeal this Court found that the attacking party could not conceivably have been of less than five because that was the number of the other party, and it was in that connection that it held that there was no doubt about the number of the participants being not less than five. It was also held that as eighteen accused participated in the crime, and the Court gave the benefit of doubt to be on the side of safety, as a matter of abundant caution, reducing the number to less than five, it may not be difficult to reach the conclusion, having regard to undeniable facts, that the number of the participants could not be less than five. That was therefore a case which was decided on its own facts but even so, it was observed as follows:

> It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is no doubt about the identity of even one.

It cannot therefore be said that the decision in ***Dharam Pal's*** case i*s* any different from the earlier decisions of this Court, or that it goes to support the view which has been taken by the High Court in the case before us. The view which has prevailed with this Court all along will therefore apply to the case before us.

19. As has been stated, the charge in the present case related to the commission of the offence of unlawful assembly by the appellant along with the other named four co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other four co-accused have been given the benefit of doubt and have been acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant Maina Singh in causing the injuries to the deceased. It was as such not permissible to invoke Section 149 or Section 34 I.P.C. Maina Singh

would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others.

20. The High Court has held that there could be no room for doubt that the firearm and the blunt weapon injuries which were found on the person of Amar Singh were caused by appellant Maina Singh and that finding has not been challenged before us by Mr. Harbans Singh. Dr Shanker Lal (PW 5) who performed the post-mortem examination stated that while all those injuries were collectively sufficient in the ordinary course of nature to cause death, he could not say whether any of them was individually sufficient to cause death in the ordinary course of nature. It is not therefore possible to hold that the death of Amar Singh was caused by the gunshot or the blunt weapon injuries which were inflicted by appellant Maina Singh. Dr Shanker Lal has stated that the fracture of the frontal bone of the deceased could have been caused by external injuries Nos. 8, 10 and 12, and that he could die of that injury also but of those three injuries injury No. 12 was inflicted by a sharp-edged weapon and could not possibly be imputed to the appellant. The evidence on record therefore does not go to show that he was responsible for any such injury as could have resulted in Amar Singh's death. The evidence however proves that he inflicted gunshot injuries on the deceased, and Dr Shanker Lal has stated that one of those injuries (injury No. 26) was grievous. Maina Singh was therefore guilty of voluntarily causing grievous hurt to the deceased by means of an instrument for shooting, and was guilty of an offence under Section 326 I.P.C. In the circumstances of the case, we think it proper to sentence him to rigorous imprisonment for 10 years for that offence. As has been stated, he has been held guilty of a similar offence for the injuries inflicted on Ajeet Singh (PW 2) and his conviction and sentence for that other offence under Section 326 I. P. C. has not been challenged before us.

21. The appeal is therefore allowed to the extent that the conviction or Maina Singh under Section 302/34 I.P.C. is altered to one under Section 326 I.P.C. and the sentence is reduced to rigorous imprisonment for ten years thereunder. The conviction under Section 326, for causing injuries to Ajeet Singh, and the sentence of rigorous imprisonment for three years and a fine of Rs 100 call for no interference and are confirmed. Both the sentences will run concurrently.

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Sexual Offences

Kanwar Pal Singh Gill v. State (Admn., U.T. Chandigarh) through Secy.

and

Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill

(2005) 6 SCC161

K.G. Balakrishnan, J.: 1. The appellant in Criminal Appeal No. 1032 of 1998 was found guilty of the offence punishable under Sections 354 and 509 of the Indian Penal Code. He challenges his conviction and sentence in this appeal. Criminal Appeal No. 430 of 1999 has been preferred by the complainant in that case and she prays that the punishment imposed on the accused should be enhanced. Both the appeals are heard together and disposed of by this common judgment.

2. On 18.7.1988, a senior IAS officer, holding the post of Financial Commissioner and Secretary to the Government of Punjab, invited some of the IAS officers and IPS officer working at Chandigarh, for a dinner at 8.30 pm at his residence in Sector 16 of Chandigarh. Apart from the IAS and IPS officers, there were a few advocates, including the Advocate General of the State of Punjab and also some journalists and press correspondents working with some leading newspapers. The guests assembled around 8.30 pm. Ladies were sitting in a semi-circle slightly away from the male guests. As per the allegation in the complaint preferred by the husband of the prosecutrix, the accused, who was then the Director General of Police of the State of Punjab, came and occupied a chair which was lying vacant at the place where the ladies were sitting. The accused then called out the prosecutrix and asked her to sit near him as he wanted to talk to her about something. When the prosecutrix was about to sit on the chair lying near the accused, the latter suddenly pulled the chair close to him and it is alleged that the prosecutrix felt slightly embarrassed and she managed to pull the chair back and sat on it. The accused again tried to pull the chair close to his chair whereupon the prosecutrix got up from the chair and returned to her original seat. The further allegation is that about ten minutes later, the accused came near the prosecutrix and asked her to come along with him. The prosecutrix strongly objected to his behaviour, but the accused was not prepared to change his tone and tenor and again he asked the prosecutrix to accompany him. The prosecutrix further alleged that she became frightened as the accused blocked her way and she tried to get away from the place whereupon the accused slapped on the posterior of the prosecutrix and the same was done in the presence of other guests. The prosecutrix then made a complaint to the host and told him that the behaviour of the accused was obnoxious and that he was not fit for a decent company. The accused was then gently removed from the place. The prosecutrix made a complaint to the Joint Director, Intelligence Bureau, who was present there. The prosecutrix narrated the incident to her husband who was also present

there. On the next day, that is 19th July, 1938, the prosecutrix sought an appointment with the Chief Secretary and recounted the entire incident to him and requested him to take suitable action against the accused. The prosecutrix met the Advisor to the Governor of Punjab and gave a full and detailed account of the incident that had happened at the dinner party. The prosecutrix explained the incident to the then Secretary to the Governor and also met the Governor. On 29th July, 1988, the petitioner gave a written complaint to the police and a case was registered, but no further steps were taken. After about four months, the husband of the prosecutrix filed a complaint before the Chief Judicial Magistrate, Chandigarh, alleging commission of offence punishable under Sections 341, 342, 352, 354, 355 and 509 IPC. Thereupon the accused preferred a criminal revision under Section 482 of the Cr.P.C. and the High Court quashed the complaint as well as further proceedings pursuant to the case registered by the police. The prosecutrix and her husband jointly challenged the verdict of the High Court before this court and the judgment of the High Court was set aside and the Chief Judicial Magistrate was directed to take cognizance of the offence under Sections 354 and 509 IPC. The Chief Judicial Magistrate later framed the charges and after a full-fledged trial the accused was found guilty of the offence punishable under Section 354 and 509 IPC. He was sentenced to undergo imprisonment for a period of three months and pay a fine of Rs. 500 for the offence under Section 354; and for the offence under Section 509 IPC, punishment of simple imprisonment for a period of two months and a fine of Rs. 200/- were imposed on the accused. In the appeal preferred by the accused, the Sessions Judge confirmed the conviction, but altered the sentence and the accused was directed to be released on probation in lieu of custodial sentence. The fine was enhanced to Rs. 50,000 with a further direction to pay half of it to the complainant. The accused challenged the same in the revision before the High Court. The High Court did not interfere with the conviction of the accused under Sections 354 and 509. However, the fine was enhanced to Rs. 2,00,000/- and the entire amount was directed to be paid to the prosecutrix. An amount of Rs. 25,000/- was directed to be paid as costs by the accused. The judgment of the High Court is challenged by the accused as well as the complainant.

3. The accused-appellant in Criminal Appeal No. 1032/98 raised many contentions before us. The counsel for the appellant disputed the correctness of the findings on various grounds, and even the factual findings entered by the court were seriously disputed. It was contended that no such incident had happened and this was a part of a conspiracy to malign the appellant who had to take so many serious actions to control the activities of the militants which were at its peak during that time. It is alleged that the accused was able to control the militant operations of the terrorists and got commendations from the Government and other administrators and this was not liked by many top-ranking bureaucrats and as part of the conspiracy, the entire case was

falsely foisted on him. It was also submitted by the appellant's counsel that the complaint itself was filed after a period of three months and the witnesses who were examined were all interested witnesses and most relevant witnesses who were alleged to have witnessed the occurrence were not examined. A pointed reference was also made to the non-examination of some of the witnesses cited by the prosecution.

4. It is true that there was some delay in filing the complaint before the Magistrate, but that by itself was not sufficient to reject the complaint put forward by the prosecutrix. It is important to note that she recounted the entire incident immediately to the Chief Secretary and other officers and raised objections and also sought for stringent action against the accused. When she failed in all these attempts, she and her husband filed the criminal complaint before the Chief judicial Magistrate. There is nothing to suggest that the prosecutrix acted in connivance with some others and that she hatched a conspiracy to malign the accused. If the whole incident is viewed in correct perspective, it is clear that the behaviour of the accused on the date of the incident was not consistent with the high standard expected of a top-ranking police officer. The findings of the various courts are to the effect that the accused gently slapped on the posterior of the prosecutrix in the presence of some guests. This act on the part of the accused would certainly constitute the ingredient of Section 354 IPC. It is proved that the accused used criminal force with intent to outrage the modesty of the complainant and that he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests would embarrass her. Knowledge can be attributed to the accused that he was fully aware that touching the body of the prosecutrix at that place and time would amount to outraging her modesty. Had it been without any culpable intention on the part of the accused, nobody would have taken notice of the incident. The prosecutrix made such a hue and cry immediately after the incident and the reaction of the prosecutrix is very much relevant to take note of the whole incident. The accused being a police officer of the highest rank should have been exceedingly careful and failure to do so and by touching the body of the complainant with culpable intention he committed the offence punishable under Section 354 and 509 IPC. In view of the findings of fact recorded by the two courts and affirmed by the High Court in revision, the order of the High Court cannot be set aside on the mere assertion by the accused that the whole incident was falsely foisted on him with ulterior motives. Therefore, we find no merit in the appeal preferred by the accused. The appeal is dismissed accordingly.

5. In the appeal preferred by the complainant, learned senior counsel Ms. Indira Jaising contended that crimes against woman are on the rise and the court should have dealt with the matter severely and the accused should not have been released on probation.

6. The incident happened in 1988. Despite the accused holding a high position in the state police, the various courts found him guilty of the offence punishable under Section 354 and 509 IPC and that by itself is setting a model for others and would enhance the faith in the judicial system. The accused had completed the period of probation. There was no occasion for any complaint or violation of any of the terms of the bond. At this juncture, we do not think that it is past and proper to resort to any other punishment. In our view, the criminal appeal No. 430 of 1999 preferred by the complainant against the judgment of the High Court is without any substance and the same is dismissed accordingly.

7. The counsel for the appellant in this appeal submitted that the complainant has no intention of withdrawing Rs. 2 lakhs ordered to be paid to her by way of compensation and that the amount may be given to any women's organization engaged in doing service for the cause of women. The amount may be lying now in the court deposit with the High Court of Punjab and Haryana. We leave the matter to the Chief Justice of the High Court of Punjab and Haryana to deal with the said compensation amount in an appropriate manner as prayed for by the complainant. A copy of this judgment shall be sent to the Registrar of the High Court of Punjab and Haryana.

State of Punjab v. *Gurmit Singh*

(1996) 2 SCC 384

DR. ANAND, J. - The prosecutrix a young girl below 16 years of age, was studying in the 10th class at the relevant time in GovernmentHigh School, Pakhowal. The matriculation examinations were going on at the material time. The examination centre of the prosecutrix was located in the boys' High School, Pakhowal. On 30-3- 1984 at about 12.30 p.m. after taking her test in Geography, the prosecutrix was going to the house of her maternal uncle, Darshan Singh, and when she had covered a distance of about 100 karmas from the school, a blue Ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh @ Bawa and Ranjit Singh accused were sitting. The car stopped near her. Ranjit Singh accused came out of the car and caught hold of the prosecutrix from her arm and pushed her inside the car. Accused Jagjit Singh @ Bawa put his hand on the mouth of the prosecutrix, while Gurmit Singh accused threatened the prosecutrix, that in case she raised an alarm she would be done to death. All the three accused (respondents herein} drove her to the tube well of Ranjit Singh accused. She was taken to the 'kotha' of the tube well. The driver of the car after leaving the prosecutrix and the three accused persons there went away with the car. In the said kotha Gurmit Singh compelled the prosecutrix to take liquor, misrepresenting to her that it was juice. Her refusal did not have any effect and she reluctantly consumed liquor. Gurmit Singh then got removed her salwar and also opened her shirt. She was made to lie on a cot in the kotha while his companions guarded the kotha from outside. Gurmit Singh committed rape upon her. She raised roula as she was suffering pain but Gurmit Singh threatened to kill her if she persisted in raising alarm. Due to that threat, she kept quiet. After Gurmit Singh had committed rape upon her, the other two accused, who were earlier guarding the kotha from outside, came in on by one and committed rape upon her. Jagjit Singh alias Bawa committed rape on her after Gurmit Singh and thereafter Ranjit Singh committed rape on her. Each one of the accused committed sexual intercourse with the prosecutrix forcibly and against her will. They all subjected her to sexual intercourse once again during the night against her will. Next morning at about 6.00 a.m. the same car arrived at the tube well kotha of Ranjit Singh and the three accused made her sit in that car and left her near the Boys' High School, Pakhowal near about the place from where she had been abducted. The prosecutrix had to take her examination in the subject of Hygiene on that date. She, after taking her examination in hygiene, reached her village Nangal-Lalan, at about noon time and narrated the entire story to her mother, Smt Gurdev Kaur PW 7. Her father Tirlok Singh PW 6 was not present in the house at that time. He returned from his work late in the evening. The mother of the prosecutrix, Smt Gurdev Kaur, PW 7, narrated the episode to her husband Tirlok Singh PW 6 on his arrival. Her father straightaway contacted Sarpanch Joginder Singh of the village. A panchayat was convened. Matter was brought to the notice of the Sarpanch of Village Pakhowal also. Both the Sarpanches tried to effect a compromise on 1-4-1984 but since the panchayat could not give any justice or relief to the prosecutrix, she along with her father proceeded to the Police Station, Raikot to lodge a report about the occurrence with the police. When they reached the bus adda of Village Pakhowal, the police met them and she made her statement, Ex. PD, before ASI Raghubir Chand PW who made an endorsement, Ex. PD/I and sent the statement Ex. PD. of the prosecutrix to the Police Station Raikot for registration of the case on the basis of which formal

FIR Ex. PD/2 was registered by SI Malkiat Singh. ASI Raghubir Chand then took the prosecutrix and her mother to the primary health centre Pakhowal for medical examination of the prosecutrix. She was medically examined by lady doctor, Dr. Sukhwinder Kaur, PW 1 on 2-4-1984, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair were also found matted. According to PW I intercourse with the prosecutrix could be "one of the reasons for laceration which I found in her hymen". She went on to say that the possibility could not be ruled out that the prosecutrix "was not habitual to intercourse earlier"

2. During the course of investigation, the police took into possession a sealed parcel handed over by the lady doctor containing the salwar of the prosecutrix along with 5 slides of vaginal smears and one sealed phial containing pubic hair of the prosecutrix, vide memo Ex. PK. On the pointing out of the prosecutrix, the investigating officer prepared the rough site plan Ex. PF, of the place from where she had been abducted. The prosecutrix also led the investigating officer to the tube well kotha of Ranjit Singh where she had been wrongfully confined and raped. The investigation officer prepared a rough site plane of the kotha Ex. PM. A search was made for the accused on 2-4-1984 but they were not found. They were also not traceable on 3-4-1984, in spite of a raid being conducted at their houses by the ASI .On 5-4-1984 Jagjit Singh alias Bawa and Ranjit Singh were produced before the investigating officer by Gurbachan Singh PW 8 and were placed under arrest. Both Ranjit Singh and Jagjit Singh on the same day were produced before Dr B.L. Bansal PW 3 for medical examination. The doctor opined that both accused were fit to perform sexual intercourse. Gurmit Singh respondent was arrested on 9-4-1984 by SI Malkiat Singh. He was also got medically examined on 9-4-1984 by Dr B.L. Bandal PW 3 who opined that Gurmit Singh was also fit to perform sexual intercourse. The sealed parcels containing the slides of vaginal smears, the pubic hair and the salwar of the prosecutrix, were sent to the chemical examiner. The report of the chemical examiner revealed that semen was found on the slides of vaginal smear through no spermatozoa was found either on the pubic hair or the salwar of the prosecutrix. On completion of the investigation, respondents were challaned and were charged for offences under Sections 363, 366,368 and 376 IPC.

3. With a view to connect the respondents with the crime, the prosecution examined Dr Sukhwinder Kaur, PW I; prosecutrix, PW 2; Dr B.L. Bansal, PW 3; Tirlok Singh, father of the prosecutrix, PW 6; Gurudev Kaur, mother of the prosecutrix, PW 7; Gurbachan Singh, PW 8; Malkiat Singh, PW 9; and SI Raghubir Chand, PW 10; besides, some formal witnesses like the draftsman etc. The prosecution tendered in evidence affidavits of some of the constables, whose evidence was of a formal nature as also the report of the chemical examiner, Ex. PM. In their statements recorded under Section 313 Cr.P.C. the respondents denied the prosecution allegations against them. Jagjit Singh respondent stated that it was a false case foisted on him on account of his enmity with the Sarpanch of Village Pakhowal. He stated that he had married a Canadian girl in the village gurdwara, which was not liked by the Sarpanch and therefore, the Sarpanch was hostile to him and had got him falsely implicated in this case. Gurmit Singh respondent took the stand that he had been falsely implicated in the case on account of enmity between his father and Tirlok Singh, PW 6, father of the prosecutrix. He stated that there was long-standing litigation going on between his father and the father of the prosecutrix and their

family members were not even on speaking terms with each other. He went on to add that on 1-4-1984 he was given a beating by Tirlok Singh, PW 6, on grounds of suspicion that he might have instigated some persons to abduct his daughter and in retaliation he and his elder brother on the next day had given a beating to Tirlok Singh, PW 6 and also abused him and on that account Tirlok Singh PW, in consultation with the police had got him falsely implicated in the case. Ranjit Singh respondent also alleged false implication but gave no reasons for having been falsely implicated. Jagjit Singh alias Bawa produced DW I Kuldip Singh and DW 2 MHC, Amarjit Singh in defence and tendered in evidence Ex. DC, a photostat copy of his passport and Ex. DD copy of a certificate of his marriage with the Canadian girl. He also tendered into evidence photographs marked 'C' and' D' evidencing his marriage with the Canadian girl. The other two accused however did not lead any defence evidence.

4. The trial court first dealt with the prosecution case relating to the abduction of the prosecutrix by the respondents and observed:

> The first point for appreciation before me would arise whether this part of the prosecution story stands fortified by any cogent or reliable evidence or not. There is a bald allegation only of prosecutrix (name omitted) that she was forcibly abducted in a car. In the FIR she stated that she was abducted in an Ambassador car of blue colour. After going through the evidence, I am of the view that this thing has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence. Prosecutrix (name omitted) was tested about the particulars of the car and she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful. She stated in her cross-examination at page 8 that the make of the car was Master. She was pertinently asked whether the make of the car was Ambassador or Fiat. The witness replied that she cannot tell the make of the car. But when she was asked as to the difference between Fiat, Ambassador or Master car, she was unable to explain the difference amongst these vehicles. So, it appears that the allegations that she was abducted in a Fiat car by all the three accused and the driver is an imaginary story which has been given either by the thanedar or by the father of the prosecutrix.
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> If the three known accused are in the clutches of the police, it is not difficult for them to come to know about the car, the name of its driver etc., but strange enough, SI Raghubir Chand has shown pitiable negligence when he could not find out the car driver in spite of the fact that he directed the investigation on these lines. He had to admit that he made search for taking the car into possession allegedly used in the occurrence. He could not find out the name of the driver nor could he find out which car was used. In these circumstances, it looks to be improbable that any car was also used in the alleged abduction. (omission of name of the prosecutrix ours)

The trial court further commented:

> On 30-3- 1984 she was forcibly abducted by four desperate persons who were out and out to molest her honour. It has been admitted by the prosecutrix that she was taken through the bus adda of Pakhowal via metalled road. It has come on the evidence that it is a busy centre. In spite of that fact she had not raised any alarm, so as to attract persons that she was being forcibly taken. The height of her own unnatural conduct is

that she was left by the accused at the same point on the next morning. The accused would be the last persons to extend sympathy to the prosecutrix. Had it been so, the natural conduct of the prosecutrix would have been first to rush to the house of her maternal uncle to apprise him that she had been forcibly abducted on the previous day. The witness after being left at the place of abduction lightly takes her examination. She does not complain to the lady teachers who were deployed to keep a watch on the girl students because these students were to appear in the centre of Boys' School. She does not complain to anybody or to her friend that she was raped during the previous night. She prefers her examination rather than go to the house of her parents or relations. Thereafter, she goes to her village Nangal-Kalan and informs for the first time her mother that she was raped on the previous night. This part of the prosecution story does not look to be probable.

5. The trial court, thus, disbelieved the version of the prosecutrix basically for the reasons: *(i)* "she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful" particularly because she could not explain the difference between a Fiat car, Ambassador car or a Master car; *(ii)* the investigating officer had "shown pitiable negligence" during the investigation by not tracing out the car and the driver; *(iii)* that the prosecutrix did not raise any alarm while being abducted even though she had passed through the bus adda of Village Pakhowal; *(iv)* that the story of abduction "has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence" and *(v)* that no corroboration of the statement of the prosecutrix was available on the record and that the story that the accused had left her near the school next morning was not believable because the accused could have no 'sympathy' for her.

6. The trial court also disbelieved the version of the prosecutrix regarding rape. It found that the testimony of the prosecutrix did not inspire confidence for the reasons *(i)* that there had been delay in lodging the FIR and as such the chances of false implication of the accused could not be ruled out. According to the trial court, Tirlok Singh PW 6 became certain on 1-4-1984 that there was no outcome of the meeting between the panchayats of Nangal-Kalan and Pakhowal, therefore, there was no justification for him not to have lodged the report on 1-4-1984 itself and since Tirlok Singh had "entered into consultations with his wife as to whether to lodge the report or not, it rendered the matter doubtful"; *(ii)* that the medical evidence did not help the prosecution case. The trial court observed that in her cross examination PW 1 lady doctor had admitted that whereas intercourse with the prosecutrix could be one of the reasons for the laceration of the hymen "there could be other reasons also for that laceration". The trial court noticed that the lady doctor had inserted a vaginal speculum for taking swabs from the posterior vaginal fornix of the prosecutrix for preparing slides and since the width of the speculum was about two fingers, the possibility that the prosecutrix was habituated to sexual intercourse could not be ruled out". The trial court observed that the prosecutrix was "fighting her imagination in order to rope in the accused persons" and that implicit reliance could not be placed on the testimony "of such a girl"; *(iii)* there was no independent corroboration of her testimony and *(iv)* that the accused had been implicated on account of enmity as alleged by the accused in their statements recorded under Section 313 Cr.P.C.

7. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was student of X class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on the account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Tirlok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village Sarpanch and complained to him. The Sarpanch of the village also got in touch with the Sarpanch of Village Pakhowal, where in the tube well kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the mater. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Tirlok Singh PW 6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Tirlok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the

story of the prosecutrix that she was left near the examination centre next morning at about 6 a.m. was "not believable" as "the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination centre so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior there is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before replying upon the same as a rule in such cases amounts to, adding insult to injury. Why should the evidence of a girl or a woman, who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration

notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In ***State of Maharashtra* v. *Chandraprakash Kewalchand Jain***, Ahmadi, J. (as the Lord Chief justice then was) speaking for the Bench summarised the position in the following words:

> A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration *(b)* to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

8. We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any 'corroboration'. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix.

9. The medical evidence has lent full corroboration to the testimony of the prosecutrix. According to PW 1 lady doctor Sukhwinder Kaur she had examined the prosecutrix on 2-4-1984 at about 7.45 p.m. at the Primary Health Centre, Pakhowal, and had found that "her

hymen was lacerated with fine radiate tears, swollen and painful". The pubic hair was also matted. She opined that intercourse with the prosecutrix could be "one of the reasons for the laceration of the hymen" of the prosecutrix. She also opined that the "possibility cannot be ruled out that (prosecutrix) was not habitual to intercourse earlier to her examination by her on 2-4-1984". During her cross-examination, the lady doctor admitted that she had not inserted her fingers inside the vagina of the prosecutrix during the medico-legal examination but that she had put a vaginal speculum for taking the swabs from the posterior vaginal fornix for preparing the slides. She disclosed that the size of the speculum was about two fingers and agreed with the suggestion made to her during her cross-examination that "if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual intercourse cannot be ruled out". However, no direct and specific question was put by the defence to the lady doctor whether the prosecutrix in the present case could be said to be habituated to sexual intercourse and there was no challenge to her statement that the prosecutrix "may not have been subjected to sexual intercourse earlier". No enquiry was made from the lady doctor about the tear of the hymen being old. Yet, the trial court interpreted the statement of PW l Dr Sukhwinder Kaur to hold that the prosecutrix was habituated to sexual intercourse since the speculum could enter her vagina easily and as such she was "a girl of loose character". There was no warrant for such a finding and the finding if we may say so with respect, is a wholly irresponsible finding. In the face of the evidence of PW I, the trial court wrongly concluded that the medical evidence had not supported the version of the prosecutrix.

10. The trial court totally ignored the report of the chemical examiner (Ex. PM) according to which semen had been found on the slides which had been prepared by the lady doctor from the vaginal secretions from the posterior of the vaginal fornix of the prosecutrix. The presence of semen on the slides lent authentic corroboration to the testimony of the prosecutrix. This vital evidence was forsaken by the trial court and as a result wholly erroneous conclusions were arrived at. Thus, even though no corroboration is necessary to rely upon the testimony of the prosecutrix, yet sufficient corroboration from the medical evidence and the report of the chemical examiner is available on the record. Besides, her statement has been fully supported by the evidence of her father, Tirlok Singh, PW 6 and her mother Gurdev Kaur, PW 7, to whom she had narrated the occurrence soon after her arrival at her house. Moreover, the unchallenged fact that it was the prosecutrix who had led the investigating officer to the kotha of the tube well of Ranjit Singh, where she had been raped, lent a built-in assurance that the charge levied by her was 'genuine' rather than 'fabricated' because it is no one's case that she knew Ranjit Singh earlier or had ever seen visited the kotha at his tube well. The trial court completely overlooked this aspect. The trial court did not disbelieve that the prosecutrix had been subjected to sexual intercourse but without any sound basis, observed that the prosecutrix might have spent the 'night' in the company of some 'persons' and concocted the story on being asked by her mother as to where she had spent the night after her maternal uncle, Darshan Singh, came to Nangal-Kalan to enquire about the prosecutrix. There is no basis for the finding that the prosecutrix had spent the night in the company of *"some persons* " and had indulged in sexual intercourse with *them* of her own free will. The observations were made on surmises and conjectures - the prosecutrix was condemned unheard.

11. The trial court was of the opinion that it was a 'false' case and that the accused had been implicated on account of enmity. In that connection it observed that since Tirlok Singh PW 6 had given a beating to Gurmit Singh on 1-4-1984 suspecting his hand in the abduction of his daughter and Gurmit Singh accused and his elder brother had abused Tirlok Singh and given a beating to Tirlok Singh PW 6 on 2-4-1984, "it was very easy on the part of Tirlok Singh to persuade his daughter to name Gurmit Singh so as to take revenge". The trial court also found that the relations between the family of Gurmit Singh and of the prosecutrix were strained on account of civil litigation pending between the parties for 7/8 years prior to the date of occurrence and that was also the reason to falsely implicate Gurmit Singh.

However the positive evidence of PW 6 and PW 7 that there was no litigation pending between PW 6 and the father of Gurmit Singh completely belied the plea of the accused. If there was any civil litigation pending between the parties as alleged by Gurmit Singh, he could have produced some documentary proof in support thereof but none was produced. Even Mukand Singh, father of Gurmit Singh, did not appear in the witness box to support the plea taken by Gurmit Singh. Even if it be assumed for the sake of argument that there was some such litigation, it could hardly be a ground for a father to put forth his daughter to make a wild allegation of rape against the son of the opposite party, with a view to take revenge. It defies human probabilities. No father could stoop so low as to bring forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending civil litigation. Again, if the accused could be falsely involved on account of that enmity, it was equally possible that the accused could have sexually assaulted the prosecutrix to take revenge from her father, for after all enmity is a double-edged weapon, which may be used for false implication as well as to take revenge. In any case, there is no proof of the existence of such enmity between PW 6 and the father of Gurmit Singh which could have prompted PW 6 to put up his daughter to falsely implicate Gurmit Singh on a charge of rape. Ranjit Singh, apart from stating that he had been falsely implicated in the case did not offer any reasons for his false implication. It was at his tube well kotha that rape had been committed on the prosecutrix. She had pointed out that kotha to the police during investigation. No ostensible reason has been suggested as to why the prosecutrix would falsely involve Ranjit Singh in the commission of such a heinous crime and nominate his kotha as the place where she had been subjected to sexual molestation by the respondents. The trial court ignored that it is almost inconceivable that an unmarried girl and her parents would go to the extent of staking their reputation and future in order to falsely set up a case of rape to settle petty scores as alleged by Jagjit Singh and Gurmit Singh, respondents.

12. From the statement of the prosecutrix, it clearly emerges that she was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. In this fact situation the question of age of the prosecutrix would pale into insignificance. However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence. Their evidence is supported by the birth certificate (Ex. PJ). Both Tirlok Singh (PW 6) and Gurdev Kaur (PW 7), the father and mother of the prosecutrix respectively, explained that initially they had named their daughter, the prosecutrix, as Mahinder Kaur but

her name was changed to... (name omitted), as according to The Holy Guru Granth Sahib her name was required to start with the word 'chhachha' and therefore in the school-leaving certificate her name was correctly given. There was nothing to disbelieve the explanation given by Tirlok Singh and Gurdev Kaur in that behalf. The trial court ignored the explanation given by the parents observing that "it could not be swallowed being a belated one". The trial court was in error. The first occasion for inquiring from Tirlok Singh (PW 6) about the change of the name of the prosecutrix was only at the trial when he was asked about Ex. PJ and there had been no earlier occasion for him to have made any such statement. It was, therefore, not a belated explanation. That apart, even according to the lady doctor (PW 1), the clinical examination of the prosecutrix established that she was less than 16 years of age on the date of the occurrence. The birth certificate Ex. PJ was not only supported by the oral testimony of Tirlok Singh PW 6 and Gurdev Kaur PW 7 out also by that of the school-leaving certificate marked' B' .With a view to do complete justice, the trial court could have summoned the official concerned from the school to prove various entries in the school leaving certificate. From the material on the record, we have come to an unhesitating conclusion that the prosecutrix was less than 16 years of age when she was made a victim of the lust of the respondents in the manner deposed to by her against her will and without her consent. The trial court did not return any positive finding as to whether or not the prosecutrix was below 16 years of age on 30-3-1984 and instead went on to observe that "even assuming for the sake of argument that the prosecutrix was less then 16 years of age on 30-3-1984, it could still not help the case as she was not a reliable witness and was attempting to shield her own conduct by indulging in falsehood to implicate the respondents". The entire approach of the trial court in appreciating the prosecution evidence and drawing inferences there from was erroneous.

13. The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably ever characterised her as "a girl of loose morals" or "such type of a girl".

14. What has shocked our judicial conscience all the more is the inference drawn by the court, based on no evidence and not even on a denied suggestion, to the effect:

> The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for on night at the house of her maternal uncle, but for reasons best known to her, she did not do so and she preferred to give company to some persons.

15. We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole -where the victim of crime is discouraged ; the criminal encouraged and in turn crime gets rewarded!. Even in cases, unlike the present case, where there is some acceptable material on the record show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour

earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court.

16. As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial court fell in error in acquitting them of the charges levelled against them. The appreciation of evidence by the trial court is not only unreasonable but perverse. The conclusions arrived at by the trial court are untenable and in the established facts and circumstances of the case, the view expressed by it is not a possible view. We accordingly, set aside the judgment of the trial court and convict all the three respondents for offences under Sections 363/366/368 and 376 IPC. So far as the sentence is concerned, the court has to strike a just balance. In this case the occurrence took place on 30-3-1984(more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been involved in any other offence after they were acquitted by the trial court on 1-6-1985, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents. We accordingly sentence the respondents for the offence under Section 376 IPC to undergo five years' R.I. each and to pay a fine of Rs. 5000 each and in default of payment of fine to 1 year's R.I. each. For the offence under Section 363 IPC we sentence them to undergo three years' R.I. each but impose no separate sentence for the offence under Sections 366/368 IPC. The substantive sentences of imprisonment shall, however, run concurrently.

17. This Court, in ***Delhi Domestic Working Women's Forum*** **v.** ***Union of India***had suggested, on the formulation of a scheme, that at the time of conviction of a person found guilty of having committed the offence of rape, the court shall award compensation.

18. In this case, we have, while convicting the respondents, imposed, for reasons already set out above, the sentence of 5 years' R.I. with fine of Rs 5000 and in default of payment of fine further R.I. for one year on each of the respondents for the offence under Section 376 IPC. Therefore, we do not, in the instant case, for those very reasons, consider it desirable to award any compensation, in addition to the fine already imposed, particularly as no scheme also appears to have been drawn up as yet.

20. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault , it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They

must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

21. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.

22. The alarming frequency of crime against women led Parliament to enact the Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) to make the law of rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114-A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was also amended.

23. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realize its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 Cr.P.C is not only significant but very important. It casts a *duty* on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and

(3) Cr.P.C. and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court,* under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 Cr.P.C. and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open court. Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their order to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) Cr PC liberally. Trial of rape cases *in camera* should be the rule and an *open trial* in such cases, an exception.

* * * *

State of U.P v. Chhoteylal
AIR 2011 SC 697

The State of Uttar Pradesh is in appeal, by special leave, because the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow reversed the judgment of the trial court and acquitted the respondent.

2. The prosecution case in brief is this: On September 19, 1989 the prosecutrix (name withheld by us) had gone to relieve herself in the evening. Ram Kali (A-3) followed her on the way. While she was returning and reached near the plot of one Vijai Bahadur, Chhotey Lal (A-1) and Ramdas (A-2) came from behind; A-1 caught hold of her and when she raised alarm, A-1 showed fire-arm to her and gagged her mouth. A-1 along with A-2 and A-3 brought the prosecutrix upto the road. There, A-3 parted company with A-1 and A-2. A-1 and A-2 then took the prosecutrix to Village Sahora. On the night of September 19, 1989, the prosecutrix was kept in the house of Girish and Saroj Pandit in Village Sahora. On the next day i.e., September 20, 1989, in the wee hours, A-1 and A-2 took the prosecutrix in a bus to Shahajahanpur where she was kept in a rented room for few days. During their stay in Shahajahanpur, A-1 allegedly committed forcible intercourse with the prosecutrix. Whenever prosecutrix asked for return to her house, A-1 would gag her mouth and threaten her. In the meanwhile, Rampal - brother of the prosecutrix - made a complaint to the Superintendent of Police, Hardoi on September 28, 1989 that A-1, A-2 and A-3 have kidnapped her sister (prosecutrix) on September 19, 1989. Based on this complaint, the First Information Report (FIR) was registered on September 30, 1989. The prosecutrix was recovered by the police on October 13, 1989 from Shahabad - Pihani Road near Jalalpur culvert. On that day itself, the prosecutrix was sent for medical examination to the Women Hospital, Hardoi where she was examined by Dr. Shakuntala Reddy. Ram Manohar Misra to whom the investigation of the case was entrusted then took steps for determination of the age of the prosecutrix as advised by the doctor and sent her for X-ray examination.

3. On October 17, 1989, the prosecutrix was produced before the Judicial Magistrate I, Hardoi, where her statement under Section 164 Cr.P.C. was recorded by the Judicial Magistrate.

4. A-1 was arrested on December 2, 1989. On completion of investigation, A-1 was chargesheeted for the offences punishable under Sections 363, 366, 368 and 376 of the Indian Penal Code (IPC); A-2 was chargesheeted under Sections 363, 366 and 368, IPC and A-3 under Sections 363 and 366, IPC.

5. The prosecution in support of its case examined five witnesses, namely, complainant - Rampal (PW-1), prosecutrix (PW-2), Investigating Officer - Ram Manohar Misra (PW-3), Subhash Chandra Misra - Head Constable (PW-4) and Dr. Shakuntala Reddy (PW-5).

6. A-2 had died and the trial abated as against him. The III Additional Sessions Judge, Hardoi vide his judgment dated September 5, 1990 acquitted A-3 as the prosecution was not able to

establish any case against her. However, on the basis of the prosecution evidence, the III Additional Sessions Judge held that the prosecutrix was about 17 = years of age at the time of occurrence of crime and found A-1 guilty under Sections 363, 366, 368 and 376, IPC and sentenced him to undergo 7 years' rigorous imprisonment under Section 376 IPC and the different sentences for other offences which were ordered to run concurrently.

7. A-1 challenged the judgment passed by the III Additional Sessions Judge, Hardoi before the Allahabad High Court, Lucknow Bench, Lucknow. The High Court vide its judgment dated March 11, 2003 reversed the judgment of the trial court and acquitted A-1. While acquitting A-1, the High Court gave three reasons, namely; (one) kidnapping took place on September 19, 1989 whereas the report of the occurrence was lodged after ten days and there was no reasonable and plausible explanation as to why the report could not be lodged promptly and why it had been delayed for ten days; (two) according to medical evidence, the prosecutrix was found to be 17 years of age and she could be even of 19 years of age at the time of occurrence and (three) no internal or external injury was found on her body and she was habitual to sexual intercourse. We deem it appropriate to reproduce the entire reasoning of the High Court as it is which reads as follows:

"It has been submitted by the learned counsel for the appellant that according to the prosecution, alleged kidnapping took place on 19-9-1989 whereas the report of the occurrence was lodged after ten days. There was no reasonable and plausible explanation forthcoming from the side of the prosecution as to why after alleged kidnapping of a minor girl a report could not be lodged promptly and why it has been delayed for ten days. This by itself shows that the report had been lodged after consultation and after due deliberation and the prosecution can be safely looked with doubt. I fully agree with the contention of the learned counsel for the appellant and furthermore, according to medical evidence on record, girl in question was found 17 years of age and she could be even 19 years of age at the time of alleged occurrence. No internal or external injury was found on her body and she was used to sexual intercourse. The charge of rape also stands not proved. The learned court below was thus not justified in believing the prosecution theory and convicting the appellant."

8. We are indeed surprised by the casual approach with which the High Court has dealt with the matter. The judgment of the High Court is not only cryptic and perfunctory but it has also not taken into consideration the crucial evidence on record. On flimsy grounds, the accused convicted of a serious crime of kidnapping and rape has been acquitted. There is no application of mind to the evidence of the prosecutrix at all. Having not been benefited by the proper consideration of the evidence by the High Court, we have looked into the entire evidence on record carefully.

9. Section 375 IPC defines rape as follows :

"S. 375. Rape.--A man is said to commit "rape"

who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :--
First.-- Against her will Secondly.-- Without her consent.
Thirdly.-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly.-- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly.-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly.-- With or without her consent, when she is under sixteen years of age.
Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."
10. Clause Sixthly--`with or without her consent, when she is under sixteen years of age' assumes importance where a victim girl is under sixteen years of age. The prosecutrix is an illiterate and rustic young woman. She does not seem to have had formal education and, therefore, there is no school certificate available on record. In the FIR, the age of the prosecutrix has been stated to be 13 years. In her statement recorded under Section 164, Cr.P.C., the prosecutrix stated that her age was 13 years. PW-1, who is elder brother of the prosecutrix, in his deposition also stated that the age of the prosecutrix was 13 years at the relevant time. However, the doctor - PW-5 on the basis of her X-ray as well as physical examination opined that the prosecutrix was 17years of age. The trial court on consideration of the entire evidence recorded a categorical finding that the prosecutrix was about 17 years of age at the time of occurrence. This is what the trial court said:
"According to the complainant Rampal, PW-2 was aged 13 years at the time of the occurrence, but during the cross-examination, the complainant has stated in para 7 of her cross examination that he was aged about 24 years and PW-2 was younger to him by 8-9 years. Thus, the age of the prosecutrix, according to the statement of the complainant appearing in para 7 of his cross examination, comes to about 15 or 16 years. PW- 2, the prosecutrix, gave her age as 13 years at the time of the occurrence. According to the supplementary report, Ext. Ka. 12 on record, prepared by Lady Dr. Shakuntala Reddy, P.W. 5, PW-2 was aged about 17 years. During the cross- examination, Lady Dr. Shakuntala Reddy, P.W. 5, has stated in para 9 of cross-examination that there could be a difference of 6 months both ways in the age of PW-2. Thus PW-2 can be said to be aged 17 = years at the time of the occurrence."

11. We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW-5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a 3-Judge Bench decision of this Court in State of Karnataka v. Bantara Sudhakara @ Sudha & Anr.1 wherein this Court at page 41 of the Report stated as under:

"Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation."

12. Learned counsel for the respondent relied upon a decision of this Court in the case of Mussauddin Ahmed v. State of Assam2 in support of his submission that the best (2008) 11 SCC 38 (2009) 14 SCC 541 evidence concerning the age of prosecutrix having been withheld, the finding of the High Court that the prosecutrix could be 19 years of age cannot be said to erroneous. In the present case, the brother of the prosecutrix has been examined as PW- 1 and, therefore, it cannot be said that best evidence has been withheld. The decision of this Court in Mussauddin Ahmed has no application at all. In our view, the High Court fell in grave error in observing that the prosecutrix could be even 19 years of age at the time of alleged occurrence.

13. Be that as it may, in our view, clause Sixthly of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause First or clause Secondly of Section 375 IPC is attracted. The expressions `against her will' and `without her consent' may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression `against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression `without her consent' would comprehend an act of reason accompanied by deliberation. The concept of `consent' in the context of Section 375 IPC has come up for consideration before this Court on more than one occasion. Before we deal with some of these decisions, reference to Section 90 of the IPC may be relevant which reads as under :

"S. 90. Consent known to be given under fear or misconception.--A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

14. This Court in a long line of cases has given wider meaning to the word `consent' in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (Second Edition), Volume 1 (1977) at page 422 the word `consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things-- a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

16. In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206, few American decisions wherein the word `consent' has been considered and explained with regard to the law of rape have been referred. These are as follows :

"In order to constitute "rape", there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent". People v. McIlvain (55 Cal. App. 2d 322)."

....."Consent," within Penal Law, ' 2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. People v. Pelvino, 214 N.Y.S. 577"

....."Consenting" as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. Hallmark v. State, 22 Okl. Cr. 422"

. . ."Will is defined as wish, desire, pleasure, inclination, choice, the faculty of conscious, and especially of deliberate, action. It is purely and solely a mental process to be ascertained, in a prosecution for rape, by what the prosecuting witness may have said or done. It being a mental process there is no other manner by which her will can be ascertained, and it must be left to the jury to determine that will by her acts and statements, as disclosed by the evidence. It is but natural, therefore, that in charging the jury upon the subject of rape, or assault with intent to commit rape, the courts should have almost universally, and, in many cases, exclusively, discussed "consent" and resistance. There can be no better evidence of willingness is a condition or state of mind no better evidence of unwillingness than resistance. No lexicographer recognizes "consent" as a synonym of willingness, and it is apparent that they are not synonymous. It is equally apparent, on the other hand, that the true relation between the words is that willingness is a condition or state of mind and "consent" one of the evidences of that condition. Likewise resistance is not a synonym of unwillingness, though it is an evidence thereof. In all cases, therefore, where the prosecuting witness has an intelligent will, the court should charge upon the elements of "consent" and resistance as being proper elements from which the jury may infer either a favourable or an opposing will. It must, however, be

recognized in all cases that the real test is whether the assault was committed against the will of the prosecuting witness. State v. Schwab, 143 N.E. 29"

17. Broadly, this Court has accepted and followed the judgments referred to in the above judicial dictionaries as regards the meaning of the word `consent' as occurring in Section 375 IPC. It is not necessary to refer to all the decisions and the reference to two decisions of this Court shall suffice. In State of H.P. v. Mango Ram3 , a 3-Judge Bench of this Court while dealing with the aspect of `consent' for the purposes of Section 375 IPC held at page 230 of the Report as under:

"Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

18. In the case of Uday v. State of Karnataka4, this Court put a word of caution that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The Court at page 57 of the Report stated :

".....In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, (2000) 7 SCC 224 (2003) 4 SCC 46 consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact.. . . . ..".

19. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. In State of Maharasthra v. Chandraprakash Kewalchand Jain5, this Court at page 559 of the Report said:

"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of

physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have (1990) 1 SCC 550 a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

20. In State of Punjab v. Gurmit Singh & Ors.6, this Court made the following weighty observations at pages 394-396 and page 403:

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.... The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.... Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.... Corroboration as a condition for judicial reliance on the testimony of (1996) 2 SCC 384 the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the

prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

22. The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the leveling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge. This Court has repeatedly laid down the guidelines as to how the evidence of the prosecutrix in the crime of rape should be evaluated by the court. The observations made in the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat8 deserve special mention as, in our view, these must be kept in mind invariably while dealing with a rape case. This Court observed as follows:

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own (1983) 3 SCC 217 permissive values, and its own code of life.

Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different

atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical....." This Court went on to observe at page 225:

".....Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition- bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

23. We shall now examine the evidence of the prosecutrix. The prosecutrix at the relevant time was less than 18 years of age. She was removed from the lawful custody of her brother in the evening on September 19, 1989. She was taken to a different village by two adult males under threat and kept in a rented room for many days where A-1 had forcible sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. Although we find that there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are natural as her recollection, observance, memory and narration of chain of events

may not be precise. Learned counsel for the respondent submitted that no alarm was raised by the prosecutrix at the bus stand or the other places where she was taken and that creates serious doubt about truthfulness of her evidence. This argument of the learned counsel overlooks the situation in which the prosecutrix was placed. She had been kidnapped by two adult males, one of them - A-1 - wielded fire- arm and threatened her and she was taken away from her village. In the circumstances, it made sensible decision not to raise alarm. Any alarm at unknown place might have endangered her life. The absence of alarm by her at the public place cannot lead to an inference that she had willingly accompanied A-1 and A-2. The circumstances made her submissive victim and that does not mean that she was inclined and willing to intercourse with A-1. She had no free act of the mind during her stay with A-1 as she was under constant fear.

27. The High Court was not at all justified in taking a different view or conclusion from the trial court. The judgment of the High Court is vitiated by non-consideration of the material evidence and relevant factors eloquently emerging from the prosecution evidence. The High Court in a sketchy manner reversed the judgment of the trial court without discussing the deposition of the witnesses as well as all relevant points which were considered and touched upon by the trial court. We are satisfied that the judgment of the High Court cannot be sustained and has to be set aside.

29. The appeal is, accordingly, allowed and the judgment of acquittal passed by the High Court of Judicature at Allahabad, Lucknow Bench, in Criminal Appeal No. 484 of 1990 is set aside. The judgment passed by the III Additional Sessions Judge, Hardoi is restored. The respondent shall now surrender within two months from today to serve out the remaining sentence as awarded by the trial court.

.....

Deepak Gulati v. State of Haryana

(2013) 7 SCC 675

Criminal appeal No.2322 of 2010

(Before Dr. B.S. Chauhan and Dipak Mishra ,JJ.)

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the impugned judgment and order dated 28.1.2010, passed by the Punjab & Haryana High Court at Chandigarh in CRA No. 960-SB of 1998 by way of which, the High Court has affirmed the judgment and order of the Additional Sessions Judge, Karnal dated 13.11.1998 passed in Sessions Case No. 7 of 1995, by way of which the appellant stood convicted for the offences punishable under section 365 and 376 of the Indian Penal Code, 1860 and sentenced to undergo rigorous imprisonment for a period of three years, alongwith a fine of Rs.2,000/- under section 365 IPC; and rigorous imprisonment for a period of seven years, alongwith a fine of Rs.5,000/- under section 376 IPC. Both the sentences were ordered to run concurrently.

2. Facts and circumstances giving rise to this appeal are that:

A. The appellant and Geeta, prosecutrix, 19 years of age, student of 10+2 in Government Girls Senior Secondary School, Karnal, had known each other for some time. Appellant had been meeting her in front of her school in an attempt to develop intimate relations with her. On 10.5.1995, the appellant induced her to go with him to Kurukshetra, to get married and she agreed. Enroute Kurukshetra from Karnal, the appellant took her to Karna lake (Karnal), and had sexual intercourse with her against her wishes, behind bushes. Thereafter, the appellant took her to Kurukshetra, stayed with his relatives for 3-4 days and committed rape upon her.

3. The prosecutrix was thrown out after 4 days by the appellant. She then went to one of the hostels in Kurukshetra University, and stayed there for a few days. The warden of the hostel became suspicious and thus, questioned the prosecutrix. The prosecutrix thus narrated the incident to the warden, who informed her father. Meanwhile, the prosecutrix left the hostel and went to a temple, where she once again met the appellant. Here, the appellant convinced her to accompany him to Ambala to get married. When they reached the bus stand, they found her father present there along with the police. The appellant was apprehended. Baldev Raj Soni, father of the prosecutrix, had lodged a complaint on 16.5.1995 under section 365 and 366 IPC, which was later converted to one under section 365 and section 376 IPC.

4. The prosecutrix was medically examined on 17.5.1995. Her statement was recorded by the Magistrate under Section 164 of the Code of Criminal Procedure, 1973 on 20.5.1995. After completing the investigation, a chargesheet was filed against the appellant, and in view of the material on record, charges under Sections 365 and Section IPC were framed against him by the Sessions Court, vide order dated 3.5.1996.

5. The prosecution examined 13 witnesses in support of its case and in view thereof, the Sessions Court convicted the appellant under Section 365/376 IPC, vide judgment and order dated 13.11.1998 and awarded him the sentence for the said charges as has been referred to hereinabove.

Aggrieved, the appellant preferred Criminal Appeal No. 960-SB of 1998 (D & M) in the High Court of Punjab and Haryana at Chandigarh, which stood dismissed by the impugned judgment and order dated 18.11.1998. Hence, this appeal.

6. None present for the appellant. In view thereof, the Court has examined the material on record and gone through both the impugned judgments with the help of Shri Kamal Mohan Gupta, learned counsel appearing on behalf of the State.

7. The statement of the prosecutrix (PW.7) was recorded under Section 164 Cr.P.C. on 20.5.1995, wherein she has clearly stated that she had gone along with the appellant to get married and for such purpose, she had also obtained a certificate from her school as proof of her age. On the said date i.e. 10.5.1995, as the appellant had been unable to reach the pre-decided place, the prosecutrix had telephoned him on the number provided by him. She has further deposed that the appellant had asked her to have a physical relationship with him, but that she had not agreed to do so before marriage. When they reached Kurukshetra and stayed with his relatives there, the appellant had sexual intercourse with her for 3 days. On the 4th day, she was thrown out of the house by the appellant and thus, she had gone to the Girls Hostel in Kurukshetra University, where she had stayed under the pretext of getting admitted to the university. However, the university personnel became suspicious, and after making enquiries from her, they telephoned her house. She then left the university and had gone to the Birla Mandir at Kurukshetra, where she had met appellant. Here he lured her once again, and thus, she had agreed to accompany him to Ambala to get married in court there. However, when they reached the old bus stand Kurukshetra, she had found her father and several police officials present there, and thereafter the appellant had been arrested and the prosecutrix was taken to Karnal.

8. The prosecutrix was examined in court as PW.7 on 5.7.1996, wherein she deposed that on 10.5.1995, as per the agreed plan, she had left her house to go alongwith the appellant to Kurukshetra to get married in court. However, she had not found the appellant at the place decided upon by them, and had thus telephoned him at the number provided to her by him. She was then informed that the appellant had already left for Kurukshetra and hence, waited for him from 12.00 noon till 1.30 p.m. When he arrived, she went alongwith the appellant at 2.30 p.m. to Karna lake (Karnal) by bus. Here, she was taken into some bushes behind the restaurant at Karna lake, and thereafter raped by the appellant. At the said time, she neither raised any objection, nor any hue and cry. The prosecutrix did not even mention the said incident to any person, despite going to Kurukshetra and staying there for 3-4 days. She raised no grievance in this regard before any person or authority at the bus stand. She continued to stay with the appellant in the house of his relatives and was raped there. The appellant continued to postpone their marriage on one pretext or the other. Thereafter, she was thrown out of the house. She thus went and stayed in the University hostel and on being questioned, she disclosed details regarding her treatment to the warden, who informed her family. After this, she went to the Birla Mandir at Kurukshetra, and here she met the appellant once again. The appellant made another attempt to convince her to go to Ambala with him to get married in court there. Upon reaching the old Bus Stand, she found her brother Rajinder there alongwith a police party, who had been accompanying them in a jeep to Karnal.

9. In his statement, Baldev Raj Soni (PW.8), father of the prosecutrix has deposed that on 10.5.1995, her daughter Geeta did not come home. He thus lodged a complaint and contacted Rajni, a friend of Geeta, who told him that the appellant Deepak had taken her to Kurukshetra. On 17.5.1995, the police had gone along with him to Kurukshetra to locate Geeta, where they had found the prosecutrix and the appellant sitting at the old bus stand in Kurukshetra. Both of them had been caught hold of by them, and were brought to Karnal.

10. Smt. P. Kant Vashisht (PW.10), Warden of Saraswati Bhawan Kurukshetra University, though did not support the case of the prosecution, and was declared hostile, has deposed in her examination in chief that Geeta, prosecutrix, had been brought to her office by one person, namely, Shri Ashwini, student of the engineering college, and that he had left Geeta in her office, stating that he would inform her parents. After sometime, her brother had come and taken her away. She was cross-examined by the prosecution, and she has deposed that the prosecutrix had in fact stayed in the hostel without any authority/permission. One Nirmla, attendant therein had allowed her to stay in the hostel without any such requisite permission.

11. Smt. Krishana Chawla (PW.3), Lecturer of Political Science in Government Senior Secondary School, Karnal, has deposed before court, and has proved the school register to show that the date of birth of the prosecutrix was 26.6.1976.

12. Dr. (Mrs.) Amarjeet Wadhwa (PW.11), Medical Officer, Government Hospital, Karnal, who examined the prosecutrix on 17.5.1995, has deposed that the prosecutrix had indulged in sexual intercourse and was habitual to the same.

13. Shri Bhagwan Chand (PW.12), ASI, the Investigating Officer, has deposed that after recording the statement of the father of the prosecutrix on 17.5.1995, he had taken her father to Kurukshetra to search for the prosecutrix alongwith one constable. At about 12.00 noon, when they reached the old bus stand at Kurukshetra, the father of the prosecutrix noticed Geeta, sitting with the appellant Deepak in one corner of the bus stand, and thereafter, they had apprehended them. He has also disposed that he had recorded the statement of the prosecutrix.

14. There exist in the statements of the witnesses material contradictions, improvements and embellishments. In the cross- examination, Baldev Raj Soni (PW.8) has deposed that he had gone to Kurukshetra with his relatives i.e. Ashwini Kumar and Surinder, and has stated that his son Rajinder was not with him at such time. He has not deposed that he had received any telephone call from the warden of any hostel, as has been suggested by the prosecutrix. Furthermore, the prosecutrix in her statement under Section 164 Cr.P.C., has not mentioned the incident involving her indulging in sexual contact with the appellant at the Karna lake at Karnal. Bhagwan Chand (PW.12) has not mentioned that any relatives of the prosecutrix had accompanied them while they were traveling from Kurukshetra to Karnal.

15. The FIR in the present case has been registered under Sections 365 and 366 IPC, by Baldev Raj Soni (PW.8), father of the prosecutrix, naming several persons, including the appellant, accusing them of enticing his daughter and wrongfully confining her at an unknown place. Thus, he has expressed his apprehension with respect to danger to the life of his daughter.

16. Admittedly, the prosecutrix has never raised any grievance before any person at any stage. In fact, she seems to have submitted to the will of the appellant, possibly in lieu of his promise to marry her. . Thus, a question arises with respect to whether, in light of the facts and circumstances of the present case, the appellant had an intention to deceive her from the very beginning when he had asked the prosecutrix to leave for Kurukshetra with him from Karnal.

17. The undisputed facts of the case are as under:

I. The prosecutrix was 19 years of age at the time of the said incident.
II. She had inclination towards the appellant, and had willingly gone with him to Kurukshetra to get married.
III. The appellant had been giving her assurance of the fact that he would get married to her.
IV. The physical relationship between the parties had clearly developed with the consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the appellant for several days, and had travelled with him from one place to another.
V. Even after leaving the hostel of Kurukshetra University, she agreed and proceeded to go with the appellant to Ambala, to get married to him there.

18 XXXXX

19. This Court considered the issue involved herein at length in the case of Uday Sigh v. State of Karnataka, AIR 2003 SC 1639, Deelip Singhv. Stae of Bihar,AIR 2005 SC 203; Yedla Srinivasa Rao v.Sate of A.P., (2006) 11 SCC 615; and Pradeep Kumar Verma v. State of Bihar and Anr , AIR 2007 7SCC 413, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to

this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. In Deelip Singh (supra), it has been observed as under:

"20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied.

In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

23. XXXXXXXXXX

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon

the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

25. The instant case is factually very similar to the case of Uday (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to. II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.
III. It was difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her.
IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

26. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre- decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police.

27. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be leveled against the appellant, in light of the afore-mentioned fact situation.

28. In view of the above, we are of the considered opinion that the appellant, who has already served more than 3 years sentence, is entitled to the benefit of doubt. Therefore, the appeal succeeds and is allowed. His conviction and sentences awarded by the courts below are set aside. The appellant is on bail. His bail bonds stand discharged.

Social Action Forum for Manav Adhikar v. Union of India
(2018) 10 SCC 443
(Before, Dipak Misra,CJI and Khanwilkar, and Dr. D.Y. Chandrachud, JJ.)

Dipak Misra, CJI

7. Presently, to the factual score. The instant Petitions have been preferred under Article 32 of the Constitution of India seeking directions to the respondents to create an enabling environment for married women subjected to cruelty to make informed choices and to create a uniform system of monitoring and systematically reviewing incidents of violence against women under Section 498-A IPC including their prevention, investigation, prosecution and rehabilitation of the victims and their children at the Central, State and District levels. That apart, prayer has been made to issue a writ of mandamus to the respondents for a uniform policy of registration of FIR, arrest and bail in cases of Section 498-A IPC in consonance with the law of the land, i.e., to immediately register FIR on complaint of cruelty and harassment by married women as per the IPC.

8. It has been averred by the petitioners that hundreds of women are being subjected to horrific acts of violence often in the guise of domestic abuse or to extract more money from the girl's natal family due to absence of any uniform system of monitoring and systematic review of incidents of violence against married women which has led to dilution of the legislative intent behind Section 498A IPC. And, in the wake of ever increasing crimes leading to unnatural deaths of women in marital homes, any dilution of Section 498A IPC is not warranted.

9. It has been contended that Section 498A IPC, since its introduction, has increasingly been vilified and associated with the perception that it is misused by women who frequently use it as a weapon against their in-laws. As per the petitioners, though there is general complaint that Section 498A IPC is subject to gross misuse, yet there is no concrete data to indicate how frequently the provision has been misused. Further, the Court, by whittling down the stringency of Section 498A IPC, is proceeding on an erroneous premise that there is misuse of the said provision, whereas in fact misuse by itself cannot be a ground to repeal a penal provision or take away its teeth.

9. It is set forth in the petition that Section 498A IPC has been specifically enacted to protect the vulnerable sections of the society who have been victims of cruelty and harassment. The

social purpose behind Section 498A IPC is being lost as the rigour of the said provision has been diluted and the offence has practically been made bailable by reason of various qualifications and restrictions prescribed by various decisions of this Court including Rajesh Sharma and others v. State of UP.(2018)10 SCC 472 a recent pronouncement.

11. It has also been submitted by the petitioners that the police is hesitant to arrest the accused on complaint of married women and the same inaction is justified by quoting various judgments, despite the fact that Section 498A IPC discloses a non-bailable offence and sufficient checks and balances have been provided in the law itself under Section 41 CrPC. To prevent arbitrary and necessary arrest, the statute very clearly states that the police shall record reasons for effecting arrest as well as for not arresting.

12. The petitioners have also asseverated that there is lack of monitoring mechanism to track cases registered under Section 498A IPC including systematic study of the reason of low convictions and due to this absence, penal laws have not been able to secure a safe married environment to women. This, as per the petitioners, has also resulted in rise in cases under Section 498A IPC because the deterrent effect of the said provision is getting diluted. It is also the case of the petitioners that investigation by the police of offence under Section 498A IPC is often unprofessional and callous and the investigating officers AIR 2017 SC 3869 : 2017 (8) SCALE 313 perceptibly get influenced by both the parties which results in perpetrators escaping conviction.

13. It is further contended that in many cases under Section 498A , IPC the Court has not considered mental cruelty caused to the woman but has concentrated only on any sign of physical cruelty due to which the courts do not look into a case if the evidence does not show that the woman was physically harassed. This has led the courts to brand the woman on many occasions as hyper-sensitive or of low tolerance level.

14. It has been further averred that the alleged abuse of the penal provision is mostly by well-educated women who know that the offence is both cognizable and non-bailable and impromptu works on the complaint of the woman by placing the man behind the bars, but this cannot be a ground for denying the poor and illiterate women the protection that is offered by Section 498A IPC against cruelty, rather there is a need to create awareness specifically in the rural areas about the laws for protection of women and consequent available remedies in case of breach.

15. It is also set forth in the petition that despite the Dowry Prohibition Act,1961 being passed, the irony still survives perhaps with more oxygen, for the social evil of dowry is on the increase and is openly practised with pride. It is put forth that women today are still tortured and often the court, despite being the ultimate saviour, does not come to the rescue of these women as a consequence of which an atmosphere of ambivalence prevails and such societal ambivalence creates a situation of war between two classes though in actuality the offence is relatable to individuals. A sorry state of affairs is pronouncedly asserted.

16. On the aforesaid bedrock, a prayer in Writ Petition (Civil) No. 73 of 2015 has been made to have a uniform policy of registration of FIR, arrest and bail in cases of Section 498A IPC. It is worthy to note here that during the pendency of this Writ Petition, the judgment had been pronounced in Rajesh Sharma (supra). The Court in Rajesh Sharma (supra) issued the following guidelines:-

"19.1 In every district one or more Family Welfare Committees be constituted by the District Legal Services Authorities preferably comprising of three members. The constitution and working of such committees may be reviewed from time to time and at least once in a year by the District and Sessions Judge of the district who is also the Chairman of the District Legal Services Authority.
(19.2) The Committees may be constituted out of para legal volunteers/social workers/retired persons/ wives of working officers/other citizens who may be found suitable and willing.
(19.3) The Committee members will not be called as witnesses.
(19.4) Every complaint under Section 498A received by the police or the Magistrate be referred to and looked into by such committee. Such committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication.
(19.5) Report of such committee be given to the Authority by whom the complaint is referred to it latest within one month from the date of receipt of complaint.
(19.6) The committee may give its brief report about the factual aspects and its opinion in the matter.
(19.7) Till report of the committee is received, no arrest should normally be effected.
(19.8) The report may be then considered by the Investigating Officer or the Magistrate on its own merit.

(19.9) Members of the committee may be given such basic minimum training as may be considered necessary by the Legal Services Authority from time to time.
(19.10) The Members of the committee may be given such honorarium as may be considered viable.
(19.11) It will be open to the District and Sessions Judge to utilize the cost fund wherever considered necessary and proper.
(19.12) Complaints under Section 498A and other connected offences may be investigated only by a designated Investigating Officer of the area. Such designations may be made within one month from today. Such designated officer may be required to undergo training for such duration (not less than one week) as may be considered appropriate. The training may be completed within four months from today;
(19.13) In cases where a settlement is reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer nominated by him in the district to dispose of the proceedings including closing of the criminal case if dispute primarily relates to matrimonial discord;
(19.14) If a bail application is filed with at least one clear day's Notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not by itself be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected.Needless to say that in dealing with bail matters, individual roles, prima facie truth of the allegations, requirement of further arrest/ custody and interest of justice must be Carefully weighed;

(19.15) In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine;

(19.16) It will be open to the District Judge or a designated senior judicial officer nominated by the District Judge to club all connected cases between the parties arising out of matrimonial disputes so that a holistic view is taken by the Court to whom all such cases are entrusted; and

(19.17) Personal appearance of all family members and particularly outstation members may not be required and the trial court ought to grant exemption from personal appearance or permit appearance by video conferencing without adversely affecting progress of the trial.

(19.18) These directions will not apply to the offences involving tangible physical injuries or death."

17. In the meanwhile, Writ Petition (Criminal) No. 156 of 2017 had been filed. A prayer had been made in the said Writ Petition to implement the suggestion that out of three members, at least two members should be appointed in the Family Welfare Committee. When this Writ Petition was listed on 13.10.2017, the following order came to be passed:-

"Mr. Alok Singh, learned counsel for the petitioner though has a different set of prayers in the writ petition, it fundamentally requires this Court to implement directions rendered in Criminal Appeal No.1265 of 2017 [Rajesh Sharma vs. State of U.P(supra). Additionally, learned counsel would submit that certain lady members, certain organizations and welfare committees are to be involved.
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18. Mr. V. Shekhar, learned senior counsel, was appointed as Amicus Curiae to assist the Court in the matter.

19. It was submitted by the learned Amicus Curiae that the decision in Rajesh Sharma (supra) requires reconsideration, for the said judgement confers powers on the Family Welfare Committee to be constituted by the District Legal Services Authority which is an extra-judicial committee of para legal volunteers/social workers/retired persons/wives of working officers/other citizens to look into the criminal complaints under Section 498 IPC in the first instance and further, there has been a direction that till such time a report of the committee is received, no arrest should be made. It is urged that the constitution of FWC to look into the criminal complaints under Section 498 IPC is contrary to the procedure prescribed under the Code of Criminal Procedure .

20. It is further propounded that the directions in certain paragraphs of the judgment in Rajesh Sharma (supra) entrusting the power to dispose of the proceedings under Section 498 IPC by the District and Sessions Judge or any other senior judicial officer nominated by him in the district in cases where there is settlement, are impermissible, for an offence under Section 498-A is not compoundable and hence, such a power could not have been conferred on any District and Sessions Judge or any senior judicial officer nominated by him. Elaborating the said submission, it is canvassed that the High Court is empowered under Section 482 CrPC to quash the proceeding if there is a settlement between the parties.

21.Learned Amicus Curiae further submitted that the recovery of disputed dowry items may not itself be a ground for denial of bail which is the discretion of the court to decide the application of grant of bail in the facts and circumstances of the case and thus, this tantamounts to a direction which is not warranted in law. Criticism has been advanced with regard to the direction in paragraph 19.15 which states that for persons who are ordinarily residing out of India, impounding of passports or issuance of Red Corner Notice should not be done in a routine manner. It is urged that if an accused does not join the investigation relating to matrimonial/family offence, the competent court can issue appropriate directions to the concerned authorities to issue Red Corner Notice which will depend on the facts of the case.

22. Learned Amicus Curiae has further put forth that dispensation of personal appearance of outstation family members is unwarranted, for in a criminal proceeding, the competent court which deals with application of exemption should be allowed to exercise the judicial discretion and there should not have been a general direction by this Court. Certain suggestions have been given by the learned Amicus Curiae which we shall refer to at the relevant stage.

23. To appreciate the controversy, it is necessary to understand the scope of Section 498-A of IPC. It reads thus:-

"498-A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, "cruelty" means—
(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

24. The said offence is a cognizable and non-bailable offence. This Court in Arnesh Kumar v. State of Bihar and another (2014) 8 SCC 273 has observed that the said offence which is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision.

25 The Court has taken note of the statistics under "Crime in India 2012 Statistics" published by the National Crime Records Bureau, Ministry of Home Affairs which shows arrest of 1,97,762 persons all over India during the year 2012 for the offence under Section 498-A. Showing concern, the Court held that arrest brings humiliation, curtails freedom and casts scars forever and the police had not learnt its lesson which is implicit and embodied in the Code of Criminal Procedure .Commenting on the police, the Court said:-

"It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result.Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."

26. The Court, thereafter, has drawn a distinction between the power to arrest and justification for the exercise of it and analysed Section 41 CrPC.

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27. Scrutinising the said provision, the Court held as under:-

"7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

x x x x x 7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41CrPC."

28. The learned Judges, thereafter, referred to Section 41-A CrPC which has been inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009). xxxxxxx

"9. …The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid." The Court further went on to say that:-

"11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii) ;

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;
11.6. Notice of appearance in terms of Section 41-ACrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;
11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.
11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court."

30. The aforesaid decision, as is perceptible, is in accord with the legislative provision. The directions issued by the Court are in the nature of statutory reminder of a constitutional court to the authorities for proper implementation and not to behave like emperors considering the notion that they can do what they please. In this context, we may refer with profit to a passage from J*oginder Kumar v. State of U.P. (1994) 4 SCC 260*

"20. … No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person‟s complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

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32. In *DK Basu v. State of W.B*.(1997)1SCC 416 also after referring to the authorities in *Joginder Kumar* (supra), *Nilabeti Behra v.State of Orissa* (1993) 2 SCC746 and others and Sate of M.P. v. Shayamsundar Trivedi and others, the Court laid down certain guidelines and we think it appropriate to reproduce the same:-

"(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the (1997) 1 SCC 416 (1993) 2 SCC 746 (1995) 4 SCC 262 police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.
(9) Copies of all the documents including the memo of arrest referred to above, should be sent to the Illaqa Magistrate for his record.
(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

33. In *Lalita Kumari v. Government of Uttar Pradesh* (2014),2 SCC1 the Constitution Bench, referring to various provisions of CrPC, adverted (2014) 2 SCC 1 to the issue of conducting a preliminary enquiry. Eventually, the Court opined that the scope of preliminary enquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence and suggested that preliminary enquiry may be held in matrimonial/family disputes.

35. In *Rajesh Sharma* (supra), as is noticeable, the Court had referred to authorities in *Arnesh Kumar (supra) and Lalita Kumari (supra)* and observed that:-

"16. Function of this Court is not to legislate but only to interpret the law. No doubt in doing so laying down of norms is sometimes unavoidable. Just and fair procedure being part of fundamental right to life, interpretation is required to be placed on a penal provision so that its working is not unjust, unfair or unreasonable. The court has incidental power to quash even a non-compoundable case of private nature, if continuing the proceedings is found to be oppressive. While stifling a legitimate prosecution is against public policy, if the proceedings in an offence of private nature are found to be oppressive, power of quashing is exercised."
17. We have considered the background of the issue and also taken into account the 243rd Report of the Law Commission dated 30th August, 2012, 140th Report of the Rajya Sabha Committee on Petitions (September, 2011) and earlier decisions of this Court. We are conscious of the object for which the provision was brought into the statute. At the same time, violation of human rights of innocent cannot be brushed aside. Certain safeguards against uncalled for

arrest or insensitive investigation have been addressed by this Court. Still, the problem continues to a great extent.
18. To remedy the situation, we are of the view that involvement of civil society in the aid of administration of justice can be one of the steps, apart from the investigating officers and the concerned trial courts being sensitized. It is also necessary to facilitate closure of proceedings where a genuine settlement has been reached instead of parties being required to move High Court only for that purpose."

36. After so stating, the directions have been issued which we have reproduced in paragraph 16 hereinabove.

37. On a perusal of the aforesaid paragraphs, we find that the Court has taken recourse to fair procedure and workability of a provision so that there will be no unfairness and unreasonableness in implementation and for the said purpose, it has taken recourse to the path of interpretation. The core issue is whether the Court in Rajesh Sharma (supra) could, by the method of interpretation, have issued such directions. On a perusal of the directions, we find that the Court has directed constitution of the Family Welfare Committees by the District Legal Services Authorities and prescribed the duties of the Committees. The prescription of duties of the Committees and further action therefor, as we find, are beyond the Code and the same does not really flow from any provision of the Code. There can be no denial that there has to be just, fair and reasonable working of a provision. The legislature in its wisdom has made the offence under Section 498-A IPC cognizable and non-bailable. The fault lies with the investigating agency which sometimes jumps into action without application of mind. The directions issued in *Arnesh Kumar* (supra) are in consonance with the provisions contained in Section 41 CrPC and Section 41-A CrPC. Similarly, the guidelines stated in *Joginder Kumar (supra) and D.K. Basu* (supra) are within the framework of the Code and the power of superintendence of the authorities in the hierarchical system of the investigating agency. The purpose has been to see that the investigating agency does not abuse the power and arrest people at its whim and fancy.

38. In *Rajesh Sharma* (supra), there is introduction of a third agency which has nothing to do with the Code and that apart, the Committees have been empowered to suggest a report failing which no arrest can be made. The directions to settle a case after it is registered is not a correct expression of law. A criminal proceeding which is not compundable can be quashed by the High Court under Section 482 CrPC. When settlement takes place, then both the parties can file a petition under Section 482 CrPC CrPC and the High Court, considering the bonafide of the petition, may quash the same. The power rests with the High Court.(*Gian Singh v. State of Punjab,(2012)10 SCC 303.)*

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39. Though *Rajesh Sharma* (supra) takes note of *Gian Singh* (supra), yet it seems to have it applied in a different manner. The seminal issue is whether these directions could have been issued by the process of interpretation. This Court, in furtherance of a fundamental right, has issued directions in the absence of law in certain cases, namely, *Lakshmi Kant Pandey v. Union of India* (1984)2 SCC244 *,Visakha and Others v. State of Rajasthan* (1997)6 SCC 241and *others and Common Cause v. Union of India*(2018)5 SCC1 and another and some others. In the obtaining factual matrix, there are statutory provisions and judgments in the field and, therefore, the directions pertaining to constitution of a Committee and conferment of power on the said Committee are erroneous. However, the directions pertaining to Red Corner Notice, clubbing of cases and postulating that recovery of disputed dowry items may not by itself be a ground for denial of bail would stand on a different footing. They are protective in nature and do not sound a discordant note with the Code. When an application for bail is entertained, proper conditions have to be imposed but recovery of disputed dowry items may not by itself be a ground while rejecting an application for grant of bail under Section 498-A IPC. That cannot be considered at that stage. Therefore, we do not find anything erroneous in direction Nos. 19.14 and19.15. So far as direction No. 19.16 and 19.17 are concerned, an application has to be filed either under Section 205 Cr.PC or Section 317 CrPC depending upon the stage at which the exemption is sought.

40. We have earlier stated that some of the directions issued in *Rajesh* (supra) have the potential to enter into the legislative field. A three-Judge Bench in *Suresh Seth v. commissioner, Indore Municipal Corporation* (2005) 13 SCC 287 ruled thus:-

"5. … In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. (2005) 13 SCC 287 Union of India18 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. …"

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42. In the aforesaid analysis, while declaring the directions pertaining to Family Welfare Committee and its constitution by the District Legal Services Authority and the power conferred on the Committee is impermissible. Therefore, we think it appropriate to direct that the investigating officers be careful and be guided by the principles stated in *Joginder Kumar (supra), DK Basu (supra), Lalita Kumari (supra)and Arnesh Kumar (supra).* It will also be appropriate to direct the Director General of Police of each State to ensure that investigating officers who are in charge of investigation of cases of offences under Section 498-A IPC should be imparted rigorous training with regard to the principles stated by this Court relating to arrest.

43. In view of the aforesaid premises, the direction contained in paragraph 19(i) as a whole is not in accord with the statutory framework and the direction issued in paragraph 19.12 shall be read in conjunction with the direction given hereinabove.

44. Direction No. 19.13 is modified to the extent that if a settlement is arrived at, the parties can approach the High Court under Section 482of the Code of Criminal Procedure and the High Court, keeping in view the law laid down in Gian Singh (supra), shall dispose of the same.

45. As far as direction Nos. 19.14, 19.15 and 19.16 and 19.17 are concerned, shall be governed by what we have stated in para 39.

46. With the aforesaid modifications in the directions issued in *Rajesh Sharma* (supra), the writ petitions and criminal appeal stand disposed of. There shall be no order as to costs.

Rawalpenta Venkalu v. *State of Hyderabad*

AIR 1956 SC 171

B.P. SINHA, J. - These two appeals by special leave arise out of the same judgment and order of a Division Bench of the Hyderabad High Court dated the 15-4-1954 confirming those of the Sessions Judge of Nalgonda dated the 18-1-1954. In Criminal Appeal No. 43 of 1955 Rawalpenta Venkalu is the appellant and in Criminal Appeal No. 44 of 1955, Bodla Ram Narsiah is the appellant. Both these persons have been sentenced to death under Section 302, Indian Penal Code for the murder of Md. Moinuddin, Banjardar of Mohiuddinpur within the jurisdiction of police station Penpabad, Circle Suryapet, District Nalgonda, on the 18-2-1953. They were placed on their trial along with three others who were acquitted by the learned trial Judge. The sentence of death was the subject matter of a reference to the High Court. The two condemned persons also came up in appeal to the High Court which dismissed the appeal and accepted the reference for confirmation of the death sentence.

2.The prosecution case, shortly stated, was that on the night between the 18th and 19-2-1953 the two appellants along with the three others (acquitted by the learned trial Judge) in pursuance of a conspiracy to commit the murder of Md. Moinuddin had set fire to the single room hut in which he was sleeping, after locking the door of the room from outside. PW 8, an old servant who was sleeping in front of the cottage outside the room occupied by the deceased, was awakened by the noise of the locking of the door from outside. Just at that time Moinuddin also called out for him from inside and asked him to open the door. PW 8 replied that he could not do so as he found the door locked from outside. Three other employees of Moinuddin, viz., PWs 4, 11 and 12 who were watching his harvest about fifty paces away, were also called out by him. When they came near the cottage, they were assaulted by the culprits. Kasim Khan was beaten severely. The two appellants then set fire to the cottage and the employees of Moinuddin were kept at bay by the superior force of the accused and their associates. Those employees naturally, therefore, went towards the main habitation in the village shouting for help. When the villagers came, the appellants and others prevented them from going to the rescue of the helpless inmate of the cottage by throwing dust in their eyes, literally speaking, and by the free use of their sticks. The first information report of the occurrence was lodged at Penpabad police station on the morning of the 19th of February by Yousuf Ali, a cousin of the deceased, to the effect that some goondas of the village had set fire to the cottage occupied by Moinuddin after chaining the outer door, with the result that he was burnt alive and that the villagers who tried to extinguish the fire had been beaten away by those goondas. The villagers thus became terrified and had to retreat to the village. This was hearsay information, as the first informant was not present at the scene of occurrence. The police inspector, after recording the first information, reached the place of occurrence in the morning that day and found the house still burning. He took along with him the doctor of that place and a photographer. The corpse was taken out of the house and inquest and post-mortem examination were held. From the room occupied by the deceased a wrist-watch was also recovered. It had stopped at 11-40. The inference had therefore been drawn that the occurrence must have taken place near about that time as burning heat must have caused the watch to stop. The police party also recovered from the outer part of the room within the compound burnt matches and one empty match box.

3.Such in short was the case which was investigated by the police. As no one had been named as accused in the first information report, the appellants were not arrested until the 22-2-1953 and on the 23rd February the appellants are said to have made their confessional statements. Those confessions were recorded by a munsif magistrate. The first appellant Venkalu, it was recorded in that statement, stated that there was tension between the deceased and Bodla Ram Narsiah (the 2nd appellant). After they had been served with toddy and wine they went to the house of the deceased and locked the house with his lock and the second appellant set fire to the house with a match stick. The fire was extinguished by wind. Then the second appellant beat Kasim Khan (one of the employees of the deceased) who was approaching the cottage and again set fire to the house. It is noteworthy that in the second incident of setting fire to the house he gives a part to himself, as also to the second appellant. He also admits having thrown dust in the eyes of people who were rushing from the village side for putting out the fire.

4. The second appellant Bodla Ram Narsiah also speaks about himself and the first appellant drinking wine and after that the first appellant locking the door of the house of the deceased. But he assigns the part of setting fire to the house to the first appellant, whereupon the occupant of the cottage Moinuddin is said to have started shouting for his servants. As the servants were coming near the cottage he admits having dealt a blow to Kasim. He also supports the first appellant in the statement that when the villagers came to the place he began to beat the villagers with a stick and the first appellant began to throw dust in their eyes, with the result that half of the cottage was burnt. It will thus be seen that except for the single difference between the two statements as to who lighted the match stick, on other points the two statements agree. The first appellant includes both of them as having lighted the match stick and set fire to the cottage, whereas the second appellant gives that part to the first appellant alone. But both of them agree in stating that whatever was done was done in pursuance of the common intention of both of them.

5.But the case against the appellant does not depend upon those confessional statements. The prosecution has examined as many as 19 witnesses, of whom PWs 4, 7 and 8 saw the occurrence from the beginning to the end and PWs 11 to 14 also saw the occurrence, though they do not bring the charge directly home to the appellants. PW 8 also does not directly incriminate them. The witnesses who saw the main occurrence of burning agreed in stating that they were frightened by the miscreants and were too afraid to disclose the names of the culprits until the police party arrived along with the servants and relations of the deceased.

6.It has been found by the courts below that there was longstanding dispute between the deceased and the family of the second appellant over land which belonged to the deceased but which was in cultivating possession of the second appellant's family. This dispute has been testified to not only by some of the prosecution witnesses, e.g., PWs 17 and 19, but was proved by documentary evidence also. As the motive for the crime, as found by the courts below, has not been challenged before us, we need not say anything more on that question.

7.The appellant in Appeal No. 43 of 1955 was represented before us by Mr Dadachanji and the appellant in Appeal No. 44 of 1955 was represented by Mr Naunit Lal. Both of them have argued in the first place that the confessional statement made by both the accused was not admissible in evidence, firstly, because it had not been voluntarily made and secondly, because

the one contradicts the other. It has also been argued that having been retracted at the sessions stage, the confessions are wholly unreliable. In this connection it is enough to point out that the learned Judges of the High Court have in the first instance discussed the positive evidence led by the prosecution to bring the charge home to the accused. They have relied upon the evidence of the two eyewitnesses, namely, PWs 4 and 7. That direct evidence clearly implicating the two appellants has been supported by a large volume of oral evidence of persons who reached the spot while the cottage was still burning. We do not find any good reasons for reopening the findings of the courts below that the oral testimony adduced in this case was by itself sufficient to prove the guilt of the appellants. After discussing and accepting the testimony of the witnesses the High Court observed as follows at the end of its judgment:

> In addition to the testimony of these two eyewitnesses there are confessions. The confessions of both the accused are fairly detailed and the learned Magistrate who recorded them has certified that it was voluntarily given. The only objection taken to the confession of A-2 before us was that he was suffering from fever and, therefore was not in full possession of his senses. A perusal of the confession has, however, shown that he was in full possession of his mind and even if he suffered from fever, it did not prevent him from giving a detailed confession. We, therefore, hold that the guilt of the accused is proved beyond reasonable doubt.

8.It is to be remarked that these confessional statements were not retracted until the accused were examined by the learned Sessions Judge under Section 342, Criminal Procedure Code. The first appellant, when questioned about the confession, answered that he gave the statement "under police pressure". He said he was beaten by the police for three days. But that is clearly a lie because he was, as already indicated, arrested on the 22nd February and the very next day his confessional statement was recorded. The second appellant, when similarly questioned, answered as follows:

> I do not know whether I had given any statement, because I was severely beaten and then I had fever.

It is clear that neither of these two appellants has been able to point to any circumstance which could lead to the conclusion that these confessional statements had been extorted from them. But it is not necessary further to examine the force and effect of these confessional statements because, as pointed out by the High Court in the passage quoted above, the direct testimony against the appellants is clear and cogent enough to bring the charge home to them.

9. It was also argued that no offence under Section 302, Indian Penal Code had been proved against the appellants, firstly, because they only set fire to the cottage and secondly, because there was no charge against either of them under Section 302 read with Section 34, Indian Penal Code. In our opinion, there is no substance in any of these contentions. The intention to kill Moinuddin is clear from the fact deposed to by the prosecution witnesses that the accused took care to lock the door from outside so that his servant PW 8 sleeping outside could be of no help to the deceased who had thus been trapped in his own cottage. Furthermore, when the villagers were roused from their sleep and were proceeding towards the cottage which was on fire, they were prevented from rendering any effective help to the helpless man, by the use of force against them by the accused. It may be that Moinuddin being the village Patel might not have

been very popular with the villagers who were therefore not very keen on saving his life. Be that as it may, the appellants took active steps to prevent the villagers from bringing any succour to the man who was being burnt alive.

10.As regards the frame of the charge, it is clear from the evidence that each one of the two appellants, if not also other persons, actively contributed to the burning of the cottage while the man had been trapped inside. According to the evidence of one of the five witnesses, namely, PW 7, both these appellants lighted a match and set fire to the house. Each one of them therefore severally and in pursuance of the common intention brought about the same results by his own act. It is also noteworthy that to both the appellants the learned Sessions Judge explained the charge against them in these words:

> You are charged of the offence that you with the assistance of other present accused, with common intention, on 18-2-53 at Mohiuddinpur village, committed murder, by causing the death of Md. Moinuddin….

It is clear therefore that though Section 34 is not added to Section 302, the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention to put an end to the life of Moinuddin. Hence the omission to mention Section 34 in the charge has only an academic significance, and has not in any way misled the accused. As already indicated, there is clear evidence that both the accused lighted a match stick and set fire to the cottage and each one of them therefore is clearly liable for the offence of murder. Their subsequent acts in repelling all attempts at bringing succour to the trapped person clearly show their common intention of bringing about the same result, namely, the death of Moinuddin. The circumstances disclosed in the evidence further point to the conclusion that the offence was committed after a preconcerted plan to set fire to the cottage after the man had as usual occupied the room and had gone to sleep. There is no doubt therefore that on the evidence led by the prosecution in this case the charge of murder has been brought home against both the appellants and that in the circumstances there is no question but that they deserve the extreme penalty of the law.

11.For the reasons given above we do not find any reasons for differing from the conclusions arrived at by the courts below. The appeals are accordingly dismissed.

* * * * *

Palani Goundan v. *Emperor*

(1919) ILR 547 (Mad)

NAPIER, J. - The accused has been convicted of the murder of his wife. The evidence shows that on Wednesday, the 23rd of October 1918, at about four or five naligais before sunset she was seen by prosecution witness No. 6 weeping and she said that her husband had beaten her. The witness told her to go home, promised to send for her father and then went to the father himself who lived in another hamlet of the same village, a mile away, a little before sunset and told him of the occurrence. After sunset the father, prosecution witness No. 2, sent his son, prosecution witness No. 3, and his son-in-law, prosecution witness No. 4, to the house where his daughter was living. Their evidence is that they arrived at the house at four or five naligais after sunset and that just outside the door they found the mother and the brother of the accused in the vasal and that the mother was remonstrating with her son inside saying "do not beat a woman." According to their evidence they did not hear any cries inside the house at that time. After they waited a few minutes the accused opened the door and came out. They say they went inside and found Ramayee lying dead on the floor with a ploughshare lying near her. They say they at once went and told Rasa Goundan, who lives two doors off from the accused's house to go and call their father, prosecution witness No. 2. Rasa Goundan, prosecution witness No. 2 who at once came and found his daughter lying dead at about 10 or 11 o'clock in the night. Prosecution witness No. 2 says that he taxed the accused with the murder of his daughter and the accused said she hanged herself. Prosecution witness No. 2 further says that he went to the monigar and reported, but the monigar was busy with a procession and only promised to report. He thought that the monigar was endeavouring to hush the matter up, so he went to report the matter to the police himself at Kodumudi, three or four miles away, and laid a complaint. This complaint was recorded at 9.15 a.m. the next morning. That the monigar was endeavouring to hush the matter up, there can be no doubt, for it is clear that he sent no report to the police whatsoever as was his duty to do. The accused told a story to the effect that he came back early in the evening to get his meals and found his wife hanging with a rope tied to the roof and he calls two witnesses who say that the accused came and told them that his wife would not let him in and they went in with him and found his wife hanging from a beam. I do not think there can be any doubt that the deceased was hanged, but the evidence of the two defence witnesses is so discrepant that it is impossible to believe their version of the occurrence. The medical evidence shows that the woman had received a severe blow on the side of her head which would probably have rendered her unconscious, and it also shows that she died of strangulation which may have been the effect of hanging. That she hanged herself is impossible because, as pointed out by the Medical Officer, the blow on the head must have produced unconsciousness and therefore she could not hang herself. I am satisfied on the evidence of the following facts: that the accused struck his wife a violent blow on the head with the ploughshare which rendered her unconscious, that it is not shown that the blow was likely to cause death and I am also satisfied that the accused hanged his wife very soon afterwards under the impression that she was already dead intending to create false evidence as to the cause of the death and to conceal his own crime. The question is whether this is murder.

Section 299 of the Indian Penal Code provides that "Whoever causes death by doing an act with the intention of causing ....such bodily injury as is likely to cause death .... commits the offence of culpable homicide"; and section 300, clause (3), provides that "if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, then in such cases culpable homicide is murder. Now, the hanging of a woman who dies from the effect of the hanging is on the face of it causing bodily injury which is sufficient in the ordinary course of nature to cause death and the section only requires that there should be homicide, namely the causing of death, to make this murder. It cannot, I think, be disputed that the accused intended to cause bodily injury for he intended to hang and did hang whether the body was alive or dead. If he had stabbed her or shot her intending it to be believed that she had stabbed or shot herself I cannot see that he would have done otherwise than intended to cause the wounds which he did cause. In this case the bodily injury was strangulation by hanging. It is, however, suggested that there is a necessary limitation, namely, that the person on whom the bodily injury is inflicted must be a person who is to the *knowledge of the accused* capable of being killed and that therefore if the accused thinks that the person is dead already he cannot be convicted of culpable homicide. One objection to this theory is that it is not necessary that the person who is killed should be a person to whom the offender intends to cause the bodily injury and that therefore his knowledge of the condition of the person killed is not a necessary element for conviction for murder. If *A* shoots at *B* with intent to kill *B* but misses *B* and kills *C,* then he has committed the murder of *C* although he did not even know that *C* was there. This point has been the subject of an express decision of this Court in a case [***The Public Prosecutor* v. *Mushunoouru Suryanarayanamoorti,***1912 11 M.L.T. 127], where the accused attempted to poison one person and the poison was taken by another. There is no doubt that such is the law and it seems to me to follow that the opinion of the person who inflicts the injury is immaterial. There is a general exception in the Penal Code which saves persons acting innocently, viz., section 79. So the burying of a person wrongly believed to be dead would be protected from the scope of section 299.

The Public Prosecutor, therefore, suggested that the proper limitation will be found by introducing the word 'unlawfully'. That would perhaps leave one class of persons unprotected as in the following instance. Suppose that in this case the accused, having struck his wife a blow on the head that made her unconscious and believing her to be dead, had gone to his relatives and told them of the occurrence and they having sent him away themselves hanged the body of the woman believing her to be dead for the purpose of concealing his crime. They would be undoubtedly acting unlawfully, for they would be guilty of an offence under section 201, namely, causing evidence of the commission of an offence to disappear with the intention of screening the offender from legal punishment, and yet it seems a strong proposition to say that they have committed murder. Of course the position of the accused in this case is far worse, for he has committed the offence of grievous hurt; and speaking for myself I see no reason why he should not have to bear the consequences of his subsequent act in killing the woman. Still it does appear that there should be some limitation of the strict words of the section and the difficulty is to say what that limitation is to be.

The protection would seem to be found in English Law by application of the doctrine of *mens rea* though this might again be affected by the doctrine of malice in law which makes the

killing in the course of a felony homicide. This doctrine of *mens rea,* though extremely difficult of definition, operates to protect persons who have no wrongful intention or other blameworthy condition of mind. To what extent it would operate to protect persons who knew that they were committing a criminal offence, namely concealment of murder, is a question which I do not propose to consider though the decision in ***The Queen* v. *Prince*** [(1875) L.R. 2 Crown Causes Reserved 154] referred to by the Public Prosecutor would seem to apply the *mens rea* to a person who intended to do an unlawful act but not the unlawful act which he in fact did. This is in fact the argument of the Public Prosecutor who asks us to apply this direction. I do not think, however, that it arises for consideration.

Mr. Mayne is quite clear that under the Penal Code the maxim is wholly out of place. He says that every offence is defined and the definition states not only what the accused must have done but his state of mind in regard to his act when he was doing it. The whole of his discussion in sections 8, 9 and 10 on *mens rea* and knowledge is worthy of very close consideration and he seems to be quite clear that all the protections found in the English Criminal Law are reproduced in the Chapter on of General Exceptions in the Penal Code. Sections 79, 80 and 81 would seem to cover all cases where a person is not acting with a criminal intent. Now, it seems to me that the particular clauses in sections 299 and 300 which we have to interpret do create what I am tempted to call constructive murder. The first clause of section 299 requires the intention of causing death; the third clause requires knowledge that he is likely by such act to cause death. In the same way the first clause of section 300 requires an intention to cause death; the second clause requires an intention to cause such bodily injury as the offender knows to be likely to cause death; and the fourth clause requires the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or is likely to cause death and the act is committed without any excuse for incurring the risk. In all these we have intention, knowledge and recklessness directed towards the causing of death. On the other hand, in the second clause to section 299 the intention is directed towards the bodily injury and in the third clause to section 300 the intention is the same. What makes the offence murder is that the bodily injury should *in fact* be likely to cause death entirely apart from intention or knowledge. The legislature has thought fit to make the offence murder without proof of intention or knowledge directed towards death on the principle, of course, that a person must be deemed to intend the natural result of the injury which he inflicts; that is to say, if he inflicts an injury which is likely to cause death and that person dies, he must take the consequences of his action. But the intention provided for is confined to the bodily injury and not to the death. That is the law which we have to apply, and unless a person can be protected by one of the general exceptions, I cannot see for myself how he is to escape from the language of the section. Apart from the actual offence of concealing a murder, it is the grossest violation of natural rights to stab, shoot or hang a person without absolute knowledge that that person is dead unless of course it is done innocently, and I see no reason why the offender should not suffer the consequences of his act.

I shall now refer to the cases. The first is ***Gour Gobindo Thakoor*** [(1866) 6 W.R. (Cr. R.) 55]. The facts are very similar. There one Gour Gobindo struck the deceased, Dil Muhammad, a blow which knocked him down and then he and others without inquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt, but the High Court quashed the proceedings and

directed the accused to be re-tried on charges of murder, culpable homicide not amounting to murder and hurt. Mr. Justice Seton-Karr says:

> If however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law, or they might have been committed for culpable homicide *not* amounting to murder.

Mr. Justice Norman says:

> Suppose, secondly, that the Thakoors had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under section 304, for culpable homicide not amounting to murder. I think a jury might fairly presume against them that they must have known that they were *likely by that act to cause death.*

The difficulty in this case is that the learned Judges did not wish to decide the case, and therefore their language is hypothetical. Mr. Justice Normansays that a jury might fairly presume knowledge that they were likely to cause death, hereby introducing a limitation which is to be found in the clauses we have under consideration. Certainly Seton-Karr, J., thinks the offence to be culpable homicide.

The next case is ***Queen Empress* v. *Khandu*** [(1891) I.L.R. 15 Bom. 194]. In that case it was found that the accused struck the deceased three blows on the head with a stick with the intention of killing him. The accused, believing him to be dead, set fire to the hurt in which he was lying with a view to remove all evidence of the crime. The medical evidence showed that the blows were not likely to cause death and did not cause death and that death was really caused by injuries from burning. Mr. Justice Birdwoodstates the provisions of section 299 and says:

> it is not as if the accused had intended, by setting fire to the shed, to make the deceased's death certain,

and therefore acquits him of murder though he convicts him of an attempt to commit murder because of the accused's own admission that he intended by the blow to kill. With great deference the learned Judge give no reason for the view he takes. Mr. Justice Parsonstook the view that the whole transaction, the blow and the burning, must be treated as one and that therefore the original intention to cause death applied to the act of burning which did cause death. The Chief Justice disagreed with Mr. Justice Parsonsas to the transactions being one and without giving any other reason acquitted. With the greatest deference to the learned Judges I do not find any assistance from the manner in which they disposed of the case. Mr. Mayne deals with this case in section 414 of his notes and is inclined to agree with the dissenting Judge that the intention should be treated as continuing up to the burning.

The last case is ***The Emperor* v. *Dalu Sardar*** [(1914) 18 CWN 1279]. In that case, the accused assaulted his wife by kicking her below the navel. She fell down and became unconscious. In order to create an appearance that the woman had committed suicide, he took up the unconscious body and, thinking it to be a dead body, hung it by a rope. The post-mortem examination showed that death was due to hanging. The Court, I think, assumed that at the time he struck her he was not intending to cause death, and, I think, we may also take it that the injury was not in fact likely to cause death. The learned Judges say that as he thought it to be a dead body he could not have intended to kill her if he thought that the woman was dead and seem to assume that the intention to cause death is a necessary element in the offence of murder. With very great deference to the learned Judges they seem to have ignored the language of sections 299 and 300 and accordingly I can find no assistance from this case. That being the state of the authorities, it seems to me to be advisable to get a definite pronouncement from this Court and I would therefore refer to a Full Bench the question whether on the facts found by us in this case the offence of murder has been committed.

SADASIVA AYYAR, J. - I agree in referring the question to a Full Bench as proposed by my learned brother. I shall however give my own opinion shortly on the matter referred. I do not think that the case of ***The Queen* v. *Prince*** [(1875) L.R. 2 Crown Cases Reserved 154] relied on strongly by Mr. Osborne has much relevancy in the consideration of the question before us. In that case the decision mainly depended upon the wording of the Statute 24 & 25 Vict., c. 100, s. 55, which made the taking unlawfully of an unmarried girl, being under the age of 16 years, out of the possession of the father a misdemeanour. The majority held in that case that there was no lawful excuse for taking her away, and the accused's ignorance of her age did not make it not unlawful. We have simply to construe the definition of culpable homicide in section 299. The intention "to cause such bodily injury as is likely to cause death" cannot, in my opinion, mean anything except "bodily injury" to a *living human body.* If this is not so, then, according to the strict letter of the definition, the relatives who burn the body of a man believing it to be dead would be guilty of culpable homicide. I may even say that it is remarkable that the words "of a human being" are not added in the body of the definition after 'death' and, as the definition stands, the causing of the death of anything with intention will be culpable homicide, which of course is a contradiction in terms. I think after the words "bodily injury" the following words must be understood, namely, "to some living human body or other" [it need not be a particular person's body according to illustration (a) and it may even be the body of another living person than the one intended actually that received the injury]. The case of ***The Emperor* v. *Dalu Sardar*** [(1914) 18 CWN 1279] is almost exactly a similar case to the present. Though (as my learned brother points out) the Judges refer only to the intention to kill and not the intention to cause bodily injury likely to cause death, the two stand clearly on the same footing.

As regards Mr. Osborne's argument that a person who does an unlawful act, such as trying to conceal a murder, should take the consequences of the same if the act done in furtherance of that unlawful intention results unintentionally in homicide, I need refer only to illustration (*c*) to section 299 which indicates that the Indian legislature did not wish to import the artificial rules of the English Law of felony into the Indian Criminal Law.

A similar case in ***Queen-Empress* v. *Khandu***[(1891) I.L.R. 15 Bom. 194] contains observations by Sargeant, C.J., and Birdwood, J., that "what occurred from first to last cannot be regarded as one continuous act done with the intention of killing the deceased" and I agree with them respectfully. As regards the case, ***Gour Gobindo Thakoor***[(1866) 6 W.R. (Cr. R.), 55], no final opinion was expressed, and the fact that the accused hastily and recklessly came to the conclusion that the woman was dead might make him liable for punishment under section 304-A (causing death by doing rash or negligent act) but not under culpable homicide, Sections 300 and 304 having the same relation to each other as section 325 and section 338 relating to grievous hurt.

WALLIS, C.J. - The accused was convicted of murder by the Sessions Judge of Coimbatore. He appealed to this Court, which took a different view of the facts from that taken by the learned Sessions Judge and has referred to us the question whether on the facts as found by the learned Judges who composed it, the accused has in law committed the offence of murder. Napier, J. inclined to the view that he had: Sadasiva Ayyar, J., thought he had not. The facts as found are these: the accused struck his wife a blow on the head with a ploughshare, which knocked her senseless. He believed her to be dead and in order to lay the foundation for a false defence of suicide by hanging, which he afterwards set up, proceeded to hang her on a beam by a rope. In fact the first blow was not a fatal one and the cause of death was asphyxiation by hanging which was the act of the accused.

When the case came before us, Mr. Osborne, the Public Prosecutor, at once intimated that he did not propose to contend that the facts as found by the learned referring Judges constituted the crime of murder or even culpable homicide. We think that he was right in doing so: but as doubts have been entertained on the subject, we think it proper to state shortly the grounds for our opinion. By English Law this would clearly not be murder but man slaughter on the general principles of Common Law. In India every offence is defined both as to what must be done and with what intention it must be done by the section of the Penal Code which creates it a crime. There are certain general exceptions laid down in chapter IV, but none of them fits the present case. We must therefore turn to the defining section 299. Section 299 defines culpable homicide as the act of causing death with one of three intentions:

(a) of causing death,
(b) of causing such bodily injury as is likely to cause death,
(c) of doing something which the accused knows to be likely to cause death.

It is not necessary that any intention should exist with regard to the particular person whose death is caused, as in the familiar example of a shot aimed at one person killing another, or poison intended for one being taken by another. "Causing death" may be paraphrased as putting an end to human life: and thus all three intentions must be directed either deliberately to putting an end to a human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to a human life. The knowledge must have reference to the particular circumstances in which the accused is placed. No doubt if a man cuts the head off from a human body, he does an act which he knows will put an end to life, *if it exists.* But we think that the intention demanded by the section must stand in some relation to a person who either is alive, or who is believed by the accused to be alive. If a man kills another by shooting

at what he believes to be a third person whom he intends to kill, but which is in fact the stump of a tree, it is clear that he would be guilty of culpable homicide. This is because though he had no criminal intention towards any human being actually in existence, he had such an intention towards what he believed to be a living human being. The conclusion is irresistible that the intention of the accused must be judged in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction as is ***Queen-Empress* v. *Khandu*** [(1891) I.L.R. 15 Bom. 194] or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in ***Gour Gobindo***case [(1866) 6 W.R. (Cri R.) 55]. The facts as the same as those found in ***The Emperor* v. *Dalu Sardar***[(1914) 18 CWN 1279]. We agree with the decision of the learned Judges in that case and with clear intimation of opinion by Sargeant, C.J. in ***Queen-Empress* v. *Khandu*** [(1891) I.L.R. 15 Bom. 194].

Though in our opinion, on the facts as found, the accused cannot be convicted either of murder or culpable homicide, he can of course be punished both for his original assault on his wife and for his attempt to create false evidence by hanging her. These, however, are matters for the consideration and determination of the referring Bench.

[When the case came on again for hearing before the Division Bench, the court convicted the accused of grievous hurt under section 326, Indian Penal Code.-***Ed.***].

In Re Thavamani

AIR 1943 Mad. 571

KING, J.- The appellant here was accused 2 prosecuted before the learned Sessions Judge of Ramnad for the murder of a woman named Meenakshi Achi on the evening of the 26th September last. The deceased was admittedly murdered in her flower garden about6 11/2 furlongs away from the village. Her dead body was found on 27th September in a well in the garden. Two persons were prosecuted for the murder. Accused 1 who was eventually acquitted, was the gardener employed in the garden. Accused 2 was an acquaintance of his, who was in need of money at the time. There is no direct evidence of from the post mortem certificate or the testimony of the doctor as to the cause of death. The body when found had marks of three punctured wounds upon the head; but those wounds by themselves according to the doctor would not be sufficient to cause death. The principal evidence upon which accused 2 was convicted comes from his own conduct. He has given a statement to the police as a result of which he has informed them of the existence of P.W. 15, who confirms his story that the two accused sold to him (P.W. 15) part of a chain which had been worn by the deceased at the time of her death. The evidence of P.W.15 and P.W. 16 taken together shows that the proceeds of the sale of this portion of the chain were divided between the two accused.

There is also a confessional statement made by accused 2 before the Taluk Magistrate of Tirupatttur. He explains how he was induced by accused 1 to assist accused in the killing of the deceased. After the first attack had been made upon the deceased he (Accused 2) prevented her from leaving the garden and then seized her legs and held her tight while, according to the confession, the murder was completed. After she had died, Accused 1 and 2 threw the body into the well. The significance of this confession which has been so signally confirmed by the discovery of P.W. 15 and P.W. 16 and the chain which was sold to the former, as proving a case of the commission of some offence against the appellant, has not been challenged in argument before us. But it is argued that the medical evidence taken in conjunction with the confession shows that there could not have been any intention on the part of accused 2 to commit murder and therefore he cannot be found guilty under section 302, Penal Code. Great stress is laid upon the statement in the confession that the deceased had died and that her dead body had been thrown into the well. The doctor on the other hand gives evidence that the only marks of external injury which he saw were of injuries which were insufficient to cause death. It is accordingly argued that accused 2 was under a misapprehension when he thought that the deceased was dead and that the blows which accused 1 with his assistance had struck at the deceased had not therefore caused her death. Whatever therefore may have been the intention of the accused in striking those blows, that intention had not been effected. The action of the appellant and accused 1 in throwing the body into the well could not possibly be in pursuance of an intention to cause her death, as they already believed that she was dead.

Reliance in support of this position is placed upon the decision in 42 Mad. 547. The learned Sessions Judge however has refused to follow that ruling and has followed instead the later ruling reported in 57 Mad. 158. It is true that in this later case there was no definite plea by the accused that at the time when he put the body of the deceased upon the railway line he thought she was dead, whereas here according to the argument the confession does contain a statement

equivalent to the expression of a belief that the deceased was already dead when the body was thrown into the well. But that is not the most important point of distinction between 42 Mad. 547 and 57 Mad. 158 at p. 171. The main point of distinction between the two cases is this, that in 42 Mad. 547 there was never at any time an intention to cause death. The original intention was only to cause injury. The second intention was only to dispose of a supposedly dead body in a way convenient for the defence which the accused was about to set up.

In 57 Mad. 158, however, and, in the present case, it is clear that there was at the beginning an intention to cause death. This intention was apparently completely carried into effect but in fact was not. Even if the intention at the second stage of the transaction had been merely to dispose of a dead body, as is pointed out in 57 Mad. 158, the two phases of the same transaction are so closely connected in time and purpose that they must be considered as parts of the same transaction. The result of the actions of the accused taken as a whole clearly is to carry out the intention to kill with which they began to act. It seems to us that there is no satisfactory reason for distinguishing the facts of the present case from the ruling in 57 Mad. 158 and that the learned Sessions Judge rightly relied upon that ruling in holding that, even if at the time when the woman was thrown into the well she was alive, and even if the appellant then thought her dead he would be guilty of murder. The conviction of the appellant for murder must therefore stand. There are clearly no extenuating circumstances of any kind in this case and the sentence of death is the only one appropriate to the circumstances. We accordingly confirm the sentence and dismiss the appeal.

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Emperor v. *Mushnooru Suryanarayana Murthy*

(1912) MLJR 333 (Mad.)

BENSON, J. – This is an appeal by the Public Prosecutor on behalf of the Government against the acquittal of one Suryanarayana Murthy, on a charge of having murdered the girl, Rajalakshmi. The facts of the case, so far as it is necessary to state them for the purposes of this appeal, are as follows:

The accused, with the intention killing Appala Narasimhulu, (on whose life he had effected large insurances without Appala Narasimhulu's knowledge, and in order to obtain the sums for which he was insured), gave him some sweetmeat (halva) in which a poison containing arsenic and mercury in soluble form had been mixed. Appala Narasimhulu ate a portion of the sweetmeat, and threw the rest away. This occurred at the house of the accused's brother-in-law where the accused had asked Appala Narasimhulu to meet him. Rajalakshmi, who was aged 8 or 9 years, and who was niece of the accused, being the daughter of accused's brother-in-law, took some of the sweetmeat and ate it and gave some to another little child who also ate it. According to one account Rajalakshmi asked the accused for a portion of the sweetmeat, but according to the other account, which we accept as the true account, Appala Narasimhulu, after eating a portion of the sweetmeat threw away the remainder, and it was then picked up by Rajalakshmi without the knowledge of the accused. The two children who had eaten the poisoned sweetmeat, died from the effects of it, but Appala Narasimhulu, though the poison severely affected him, eventually recovered. The accused has been sentenced to transportation for life for having attempted to murder Appala Narasimhulu. The question which we have to consider in this appeal is whether, on the facts stated above, the accused is guilty of the murder of Rajalakshmi.

I am of the opinion that the accused did cause the death of Rajalakshmi and is guilty of her murder. The law on the subject is contained in Sections 299 to 301 of the Indian Penal Code and the whole question is whether it can properly be said that, the accused "caused the death" of the girl, in the ordinary sense in which those words should be understood, or whether the accused was so indirectly or remotely connected with her death that he cannot properly be said to have "caused" it. It is not contended before us that the accused intended to cause the death of the girl, and we may take it for the purpose of this appeal that he did not know that his act was even likely to cause her death. But it is clear that he did intend to cause the death of Appala Narasimhulu. In order to effect this he concealed poison in a sweetmeat and gave it to him eat. It was these acts of the accused which caused the death of the girl, though no doubt her own action, in ignorantly picking up and eating the poison, contributed to bring about the result. Section 299 of the Indian Penal Code says: "Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." It is to be observed that the section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he "causes the death" of any one, whether the person intended to be killed or any one else. This is clear from the first illustration to the section, "A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby

caused Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide."

Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person. That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration, viz. A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu in throwing away part of the sweetmeat, nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl's death. The Indian Law Commissioners in their report (1846) on the Indian Penal Code call attention to the unqualified use of the words "to cause death" in the definition of culpable homicide, and rightly point out that there is a great difference between acts which cause death immediately, and acts which cause death remotely, and they point out that the difference is a matter to be considered by the courts when estimating the effect of the evidence in each case. Almost all, perhaps all, results are caused by a combination of causes, yet we ordinarily speak of a result as caused by the most conspicuous or efficient cause, without specifying all the contributory causes. In Webster's Dictionary "cause" is defined as "that which produces or effects a result; that from which anything proceeds and without which it would not exist" and again "the general idea of cause is that without which another thing, called the effect, cannot be; and it is divided by Aristotle into four kinds known by a name of the material, the formal, the efficient and the final cause. The efficient cause is the agent that is prominent or conspicuous in producing a change or result."

In the present case I think that the accused's action was the efficient cause of the girl's death, though her own action in picking up and eating the poison was also necessary in order to effect her death; just as in the illustration given in the Code the man who laid the turf and sticks over the pit with the intention of causing death was held to be the cause of the death of the man who ignorantly fell into the pit; although the death would not have occurred if he had not of his own free will walked to the spot where the pit was. The Code says that the man who made the pit is guilty of culpable homicide, and, in my opinion, the accused in the present case, who mixed the poison in sweetmeat and gave it to be eaten, is equally guilty of that offence. The *mens rea* which is essential to criminal responsibility existed with reference to the act done by the accused in attempting to kill Appala Narasimhulu, though not in regard to the girl whose death he, in fact, caused, and that is all that the section requires. It does not say "whoever voluntarily causes death", or require that the death actually caused should have been voluntarily caused. It is sufficient if death is actually, even though involuntarily, caused to one person by

an act intended to cause the death of another. It is the criminality of the intention with regard to the latter that makes the act done and the consequence which follows from it an offence.

Turning now to Section 301, Indian Penal Code, we find that culpable homicide is murder if the act by which death is caused is done with the intention of causing death, and does not fall within certain specified exceptions, none of which are applicable to the present case.

It follows that the accused in the present case is guilty of murder, and this is rendered still more clear by Section 301 of the Code. The cases in which culpable homicide is murder under Section 301 are not confined to cases in which the act by which the death is caused is done with the intention of causing death. Section 301 specifies other degrees of intention or knowledge which may cause the act to amount to murder; and then Section 301 enacts that "if a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends or knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The section does not enact any rule deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to either Section 299 or Section 300, as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, now knew himself to be likely, to kill, a rule which though it does not lie on the surface of Section 299, yet is, as we have seen, deducible from the generality of the words "causes death" and from the illustration to the section; and the rule then goes on to state that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the Sections 299 and 300 though not perhaps, lying on their very surface. The conclusion, then, at which I arrive, is that the accused in this case is guilty of murder as defined in Sections 299 to 300, Indian Penal Code.

This conclusion is in accord with the view of Norman, Offg., C. J., and Jackson, J., in the case reported in 13 W.R. Criminal Letters, p. 2, where it said: "The prisoner gave some poisoned rice water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison. The offence of the prisoner, under Section 301 of the Indian Penal Code, is murder." That the present accused would be guilty of murder under English Law is clear from the case of ***Agnes Gore***. In that case Agnes Gore mixed poison in some medicine sent by an Apothecary, Martin, to her husband, which he ate but which did not kill him, but afterwards killed the Apothecary, who to vindicate his reputation, tasted it himself, having first stirred it about. "It was resolved by all the Judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; i.e. the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause; and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causa sequitur, et*

dicuntur eventus quia ex causis eveniunt, and the stirring of the electuary by the Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death." (King's Bench 77 English Reports, p. 853 at p. 854)

A number of other English cases have been referred to, but it is unnecessary to discuss them as we must decide the case in accordance with the provisions of the Indian Penal Code, and these are not necessarily the same as the English Law.

In the result, I would allow the appeal by Government and convict the accused of the murder of Rajalakshmi.

The accused was originally sentenced to seven years' rigorous imprisonment for having attempted to murder Appala Narasimhulu. This sentence was enhanced to one of transportation for the life by this court acting as a court of revision in December, 1910, when this appeal was not before them. Looking to these facts I am unwilling to now impose a sentence of death, though it would have been appropriate if the accused had been convicted of murder at the original trial.

SUNDARA AIYER, J. – In this case the accused Suryanarayana Murthy was charged by the Sessions Court of Ganjam with the murder of a young girl named Rajalakshmi and with attempt to murder one Appala Narasimhulu by administering poison to each of them on the 9th February 1910. He was convicted by the Sessions Court on the latter count but was acquitted on the former count and was sentenced to seven years' rigorous imprisonment. He appealed against the conviction and sentence in Criminal Appeal No. 522 of 1910, and this court confirmed the conviction and enhanced the sentence to transportation for life. The present appeal is by the Government against his acquittal on the charge of murdering Rajalakshmi.

The facts as found by the lower court are that the accused, who was a clerk in the Settlement Office at Chicacole, got the life of Appala Narasimhulu, the prosecution 1st witness, insured in two Insurance Companies for the sum of Rs. 4,000 in all having paid the premium himself; that the 2nd premium for one of the insurances fell due on the 12th January, 1910, and the grace period for its payment would elapse on the 12th February, 1910, that the prosecution 1st witness being at the same time badly pressed for means of subsistence asked the accused for money on the morning of 9th February; that the latter asked him to meet him in the evening at the house of his (the accused's) brother-in-law, the prosecution 8th witness; that at the house the accused gave the prosecution 1st witness a white substance which he called 'halva' but which really contained arsenic and mercury in soluble form; that the prosecution 1st witness having eaten a portion of the halva threw aside the rest; that it was picked up by the daughter of the prosecution 8th witness, the deceased Rajalakshmi, who ate a portion of it herself and gave another portion to child of a neighbour; and that both Rajalakshmi and the other child were seized with vomiting and purging and finally died, Rajalakshmi some four days after she ate the halva and the child two days earlier. After the prosecution 1st witness had thrown away the halva both he and the accused went to the bazaar and the accused gave prosecution 1st witness some more halva. The prosecution 1st witness suffered in consequence for a number of days but survived. The accused, as already stated, has been sentenced to transportation for life for attempting to murder the prosecution 1st witness.

The case for the prosecution with reference to the poisoning of Rajalakshmi was, as sworn to by the prosecution 1st witness, that, when the accused gave him the halva, the girl asked for a piece of it and that the accused, though he reprimanded her at first, gave her a small portion. But I agree with the learned Sessions Judge that this story is improbable. The girl was the accused's own niece being his sister's daughter. He and her father (the prosecution 8th witness) were on good terms. He had absolutely no motive to kill her, and there was no necessity for giving her the halva. The accused, in his statement to the Magistrate (the prosecution 22nd witness) soon after the occurrence, said that the girl had picked up the halva and eaten it. He had made a similar statement to the prosecution 8th witness when the latter returned to his house on the evening of the 9th immediately after the girl had eaten it. This statement is in accordance with the probabilities of the case, and I accept the Sessions Judge's finding that the halva was not given to the girl by the accused but, picked up by her after the prosecution 1st witness had thrown it way. The question we have to decide is whether, on these facts, the accused is guilty of the murder of the girl. At the conclusion of the arguments we took time to consider our judgment, as the point appeared to us to be one of considerable importance, but we intimated that, we would not consider it necessary, in the circumstances, to inflict on him the extreme penalty of the law.

It is clear that the accused had no intention of causing the death of the girl Rajalakshmi. But it is contended that the accused is guilty of murder as he had the intention of causing the death of the prosecution 1st witness, and it is immaterial that the had not the intention of causing the death of the girl herself. Section 299, Indian Penal Code, enacts that 'whoever causes death by doing an act with the intention of causing death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." Section 300 says "culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death." Section 301 lays down that "if a person, by doing anything which he intends or knows to be likely to cause death commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause." The contention of the learned Public Prosecutor, to put it very shortly, is (1) that it was the accused's act that caused the death of the girl and (2) that the accused had the intention of causing death when he gave the poison to the prosecution 1st witness and was, therefore, guilty of any death that resulted from his act. He urges that the sections of the Penal Code practically reproduce the English Law according to which the causing of death with malice aforethought, though the malice may not be directed against a particular individual whose death ensues, would amount to murder. Before referring to the English Law, I shall consider the provisions of the Penal Code bearing on the subject. If Mr. Napier's contention be sound it would make no difference whether Appala Narasimhulu, the prosecution 1st witness, also died in consequence of the poison or not; nor would it make any difference if, instead of the poison being picked up by the girl and eaten by herself, she gave it to some one else and that one to another again and so on if it changed any number of hands. The accused would be guilty of the murder of one and all of the persons who might take the poison, though it might have been impossible for him to imagine that it would change hands in the manner that it did. The contention practically amounts to saying that the intervention of other agencies, and of any number of them, before death

results, would make no difference in the guilt of the accused, that causing death does not mean being the proximate cause of the death, but merely being a link in the chain of the cause or events leading to the death and that further any knowledge on the part of the accused that such a chain of events might result from his act is quite immaterial. It is, prima facie, difficult to uphold such an argument. Now is there anything in the Sections of the Penal Code to support it? Section 39 provides that "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." The illustration to the section is that if a person sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery, and thus causes the death of a person, he would be taken to have caused the death voluntarily if he knew that he was likely to cause death and may even be sorry that death had been caused by his act. The section and the illustration both show that causation with respect to any event involves that the person should have knowledge that the event was likely to result from his act. Section 299, Indian Penal Code, in my opinion, does not lead to a different conclusion. But before dealing with it, I must turn to Section 301, Indian Penal Code. That section apparently applies to a case where the death of the person, whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact occur but the death of some one else occurs as the result of the act done by him. It evidently does not apply where the death both of the person, whose death was in contemplation, and of another person or persons, has occurred. Can it be said that, in such a case, the doer of the act is guilty with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination? Such a proposition it is impossible to maintain in criminal law. Section 301 of the Indian Penal Code has reference to a case where a person intending to cause the death of A, say by striking or shooting him, kills B because B is in the place where he imagined A to be, or B rushes in to save A and receives the injury intended for A. The reason for no exculpating the wrong-doer in such cases is that he must take the risk of some other person being in the place where he expected to find A, or, of some one else intervening between him and A. The section is a qualification of the rule laid down in Section 299 and is evidently confined to cases where the death of the person intended to known to be likely to be killed does not result. If the public Prosecutor's general proposition were right, Section 301 of the Indian Penal Code would seem to be unnecessary, as Section 299 would be quite enough. If a person is intended by Section 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and what is more important, Section 301 of the Indian Penal Code would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect “voluntarily”, and a person is not responsible for the involuntary effects of his acts. Illustrations A and B, in my opinion, support this view. Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily; and Section 321 shows that hurt to the particular person in question must have been intended or foreseen. In the eye of the law, no

doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might, in some cases, be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary causes with the original act to lead to the result, it is more difficult to decide whether the act in question can be said to be the cause of the effect finally produced. The Code throws very little light on the question. Ordinarily, a man is not criminally responsible for the acts of another person, and ordinarily his act should not be held to be the cause of a consequence which would not result without the intervention of another human agency. Sir J. Fitz James Stephen in his ***History of the Criminal Law of England***, Vol. III, p. 8, says: "A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, A tells B of facts which operate as a motive to B for the murder of C. It would be an abuse of language to say that A had killed C, though no doubt he has been the remote cause of C's death." The learned author proceeds to point out that, even when a person counsels, procures or commands another to do an act, he would be only guilty as an abettor but not as a principal offender whose act caused the result, say murder. This is the well settled principle of the English Law, though there appear to be one or two exceptions, to be hereafter pointed out. No such exceptions are mentioned in the Indian Code. They may perhaps be recognised where the doer of the act knew that it would be likely that his own act would lead other persons, not acting wrongfully, to act in such a manner as to cause the effect actually produced. But the scope of the exceptions cannot cover those cases where the doer could not foresee that other persons would act in the manner indicated above. This is the principle adopted in determining civil liability for wrongs. See the discussion of the question in ***Baker* v. *Snell*** [(1908) 2 KB 825]. A stricter rule cannot be applied in cases of criminal liability.

Now, can it be said that the accused, in this case, knew it to be likely that the prosecution 1st witness would give a portion of the girl Rajalakshmi? According to Section 26 of the Indian Penal Code "a person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise." A trader who sells a basket of poisoned oranges may be said to have sufficient 'reason to believe' that the buyer would give them to various persons to eat; but one who gives a slice of an orange to another to eat on the spot could not be said to have sufficient 'reason to believe' that he would give half of that slice to another person to eat or that he would throw away a portion and that another would eat it. The poison was thrown aside here not by the accused but by the prosecution 1st witness. The girl's death could not have been caused but for the intervention of the prosecution 1st witness's agency. The case, in my opinion, is not one covered by Section 301 of the Indian Penal Code. The conclusion, therefore, appears to follow that the accused is not guilty of culpable homicide by doing an act which caused the death of the girl. Mr. Napier, as already mentioned, has contended that the law in this country on the question is really the same as in England; and he relies on two English cases in support of his contention, viz., ***Saunder*** case and ***Agnes Gore*** case. I may preface my observations on the English Law by citing Mr. Mayne's remark that "culpable homicide is

perhaps the one branch of criminal law in which an Indian student must be most careful in accepting the guidance of English authorities." According to the English Law "murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought, either express or implied by law. This malice aforethought which distinguishes murder from other species of homicide is not limited to particular ill-will against the persons slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. Any formed design of doing mischief may be called malice; and therefore, not only killing from premeditated hatred or revenge against the person killed, but also, in many other cases, killing accompanied with circumstances that show the heart to be previously wicked is adjudged to be killing of malice aforethought and, consequently, murder." - **RUSSELLon *Crimes and Misdemeanours***, 7th Edition, Volume I, p. 655. It will be observed that, in this definition, malice is made an essential requisite, and all cases have to be brought under it. Knowledge that the act is likely to cause death is not part of the definition. Nor have we any words to import what is contained in the explanations to Section 299 of the Indian Penal Code or in Cls. 2, 3 and 4 of Section 300. The law was worked out of England to its present condition by a series of judicial decisions. This accounts for the statement that general malice is enough and that it need not be directed against the particular individual killed. Hence also the proposition that wicked intention to injure is enough and intention to kill that individual is not necessary. See **Roscoe's *Criminal Evidence***, 13th Edition, pages 617 to 619. Malice again is explained to mean malice implied by law as well as malice in fact. The result is, the law in England is not as different from that in India as a comparison of the definitions might, at first sight, indicate. This is apparent from the statement of the English Law at pp. 20-22, Vol. III of **Stephen's*History of the Criminal Law***. The statement, however, shows that the law is not identical in both countries. In England an intention to commit any felony will make the act murder if death results. Again "if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a crime, the inciter is the principal *ex necessitate*, though absent when the thing was done. In point of law, the act if he were innocent agent is as much the act of the procurer as if he were present and did the act himself." See **Russellon *Crimes,*** Vol. I, page 104. The Indian law does not make the abettor guilty of the principal offence in such circumstances. There is also a presumption in the English Law that "all homicide is malicious and murder, until the contrary appears from circumstances of alleviation, excuse or justification; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they arise out of the evidence produced against him." There is no such presumption here. In ***Saunder*** case as stated in **Roscoe's *Criminal Evidence***, p. 154, the prisoner intending to poison his wife gave her a poisoned apple which she, ignorant of its nature gave to a child who took it and died. This was held murder in the husband, although being present he endeavoured to dissuade his wife from giving it to the child. In **Hale's*Pleas of the Crown***, Vol. I, p. 436, it is not stated that the prisoner endeavoured to dissuade his wife from giving the apple to the child. On the other hand, the author says: "If A commands or counsels B to kill C and before the fact is done A repents and comes to B and expressly discharges him from the fact and countermands it, if after this countermand B does it, it is murder in B; but A is not accessory." The decision apparently proceeded on the English rule that the innocence of the intervening agent had the effect of

holding the prisoner liable as the principal offender. In ***Agnes Gore*'s** case, the wife who mixed ratsbane in a potion sent by the apothecary to her husband which did not kill him but killed the apothecary who, to vindicate his reputation, tasted it himself, having first stirred it up, was held guilty of murder because the wife had the intention of killing the husband though not of killing the apothecary. It is possible that an Indian court may hold in such a case that it was the duty of the wife to warn and prevent the apothecary from tasting the potion and that she was guilty of an illegal omission in not doing so. Whether the case might not come under Section 301, Indian Penal Code, also it is unnecessary to consider. In ***The Queen* v. *Latimer*** the prisoner, in striking at a man, struck and wounded a woman under 24 and 25 Vic., C. 100 Section 20, for unlawfully and maliciously wounding her, the Jury found that the blow 'was unlawful and malicious and did in fact wound her, but that the striking of her was purely accidental and not such a consequence of the blow as the prisoner ought to have expected.' The Court of Crown Cases Reserved held that the prisoner was guilty. The decision proceeded upon the words of statute. Section 18 enacted that "whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person with malicious intent shall be guilty of felony." Then Section 20, leaving out the intent, provided any grievous bodily harm upon any other person shall be guilty of misdemeanour. Lord Coleridge, C. J., pointed out that the language of Sections 18 and 20 was different and that the intention should be against the person injured. In Regina v. Michael, where a bottle containing poison was put on the mantel-piece where a little child found it and gave part of the contents to the prisoner' child who soon after died, the Judges were of opinion that "the administering of the poison by the child was under the circumstances of the case as much in point of law an administering by the prisoner as if the prisoner had actually administered it with her own hand." This decision also, no doubt, proceeded on the ground of want of discretion in the intervener, the child. The Indian courts may hold that a person who keeps poison at a place where others might have access to it must be taken to know that death is likely to result from the act. It is clear that English decisions are not always a safe guide in deciding cases in this country where the provisions of the Penal Code must be applied. In ***Shankar Balkrishna* v. *King-Emperor,*** the Calcutta High Court held that the prisoner in the case, an Assistant Railway Station Master, was not liable where death would not have resulted if the guard had not acted carelessly, as the prisoner could not be taken to know that the accident to the train which resulted in the loss of human life was likely to lead to death. In ***Empress* v. *Sahae Rae***, which may be usefully compared with ***The Queen* v. *Latimer*** and where also the prisoner was held guilty, the decision was put on the ground that the prisoner knew it to be likely that the blow would fall on a person for whom he had not intended it. Holding, as I do, that, in the circumstances of this case, the prisoner could not be said to have known that it was likely that the prosecution 1st witness would throw aside the halva so as to be picked up and eaten by some one else and that the prisoner was not responsible, in the circumstances, for the voluntary act of prosecution 1st witness, I must come to the conclusion that the prisoner is not guilty of the murder of the girl Rajalakshmi. It is not contended that there was a legal duty on the part of the accused to prevent the girl from eating the halva and that he was guilty of murder by an illegal omission.

I would uphold the finding of acquittal of the lower court and dismiss the appeal.

BENSON, J.- As we differ in our opinion as to the guilt of the accused, the case will be laid another Judge of this court, with our opinions under Section 429, Criminal Procedure Code. This appeal coming on for hearing under the provisions of Section 429 of the Code Criminal Procedure.

RAHIM, J. - The question for decision is whether the accused Suryanarayanamurthy is guilty of an offence under Section 302, Indian Penal Code, in the following circumstances. He wanted to kill one Appala Narasimhulu on whose life he had effected rather large insurances and for that purpose gave him some halva (a sort of sweet meat), in which he had mixed arsenic and mercury in a soluble form, to eat. This was at the house of the accused's brother-in-law, where Appala Narasimhulu had called by appointment. The man ate a portion of the halva, but not liking its taste threw away the remainder on the spot. Then, according to the view of the evidence accepted by my learned brothers Benson and Sundara Aiyar JJ., as well as by the Sessions Judge, a girl of 8 or 9 years named Rajalakshmi, the daughter of the accused's brother-in-law, picked up the poisoned halva, ate a portion of it herself, and gave some to another child of the house. Both the children died of the effects of the poison, but Appala Narasimhulu, the intended victim, survived though after considerable suffering. It is also found as a fact, and I agree with the finding, that Rajalakshmi and the other girl ate the halva without the knowledge of the accused, who did not intend to cause their deaths. Upon these facts Benson J. would find the accused guilty of the murder of Rajalakshmi, while Sundara Aiyar J., agreeing with the Sessions Judge, holds a contrary view.

The question depends upon the provisions of the Indian Penal Code on the subject as contained in Sections 299 to 301. The first point for enquiry is whether the definition of culpable homicide as given in Section 299 requires that the accused's intention to cause death or his knowledge that death is likely to be caused by such act, or is it sufficient for the purposes of the section if criminal intention or knowledge on the part of the accused existed with reference to any human being, though the death of the person who actually fell a victim to the accused's act was never compassed by him. I find nothing in the words of the section which would justify the limited construction. Section 299 says: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." The language is perfectly general; all that it requires is that there should be an intention to cause death or a knowledge that death is likely to be the result, and there is nothing in reason which, in my opinion, would warrant us in saying that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. The law affords protection equally to the lives of all persons, and once the criminal intention, that is, an intention to destroy human life, is found, I do not see why it should make any difference whether the act done with such intention causes the death of the person aimed at or of some one else. Illustration (a) to Section 299 makes it quite clear that the legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused by the act of the accused was not the person intended to be killed by him but some other person. Section 301 also supports this construction as it assumes that the accused in such cases would be guilty of culpable homicide; and I may here point out that the object of this section is to lay down that the nature of culpable homicide of which the accused

in these cases would be guilty, namely whether murder or not, would be the same as he would have been guilty of, if the person whose death was intended to be brought about had been killed. Now the first paragraph of Section 300 declares that culpable homicide shall be deemed to be murder if the act by which death is caused is done with the intention of causing death, using so far the very words of Section 299. In the 2nd and 3rd paragraphs of Section 300 the language is not quite identical with that of the corresponding provisions in Section 299, and questions may possibly arise whether where the fatal act was done not with the intention of causing death but with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the accused is likely by such act to cause death, the offence would be one of murder or culpable homicide not amounting to murder. But it is not necessary for me to express any opinion on these matters as in the present case the prisoner undoubtedly intended to cause death.

The next point for consideration is whether the death of Rajalakshmi was caused by the accused's act within the meaning of Section 299. The question is really one of fact or of proper inference to be drawn from the facts. That girl's death was caused by eating the sweetmeat in which the accused had mixed poison and which he brought to the house where the girl lived in order to give it to the man for whom it was intended. It was given to him, but he, not relishing the taste of it, threw it down. The deceased girl soon afterwards picked it up and ate it. But the accused was not present when Rajalakshmi ate it, and we may even take it that, if the accused had been present, he would have prevented the girl from eating the sweetmeat. These being the facts, there can be, however, no doubt, that the act of the accused in mixing arsenic in the halva and giving it to Appala Narasimhulu in Rajalakshmi's house was one cause in the chain of causes which brought about the girl's death. The question then is whether this act of the accused was such a cause of Rajalakshmi's death as to justify us in imputing it to such act. In my opinion it was. Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause. Now, suppose, in this case Appala Narasimhulu had discovered that the sweetmeat was poisoned and then gave it to Rajalakshmi to eat, it is to his act that Rajalakshmi's death would be attributed and not to the accused's. Or suppose Appala Narasimhulu, either suspecting that the sweetmeat was poisoned or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so

as to put it out of harm's way and Rajalakshmi happening afterwards to pass that way, picked it up, and ate it and was killed, the act of the accused in mixing the poison in the sweetmeat could in that case hardly be said to have caused her death within the meaning of Section 299. On the other hand, suppose Appala Narasimhulu, finding Rajalakshmi standing near him and without suspecting that there was anything wrong with the sweetmeat, gives a portion of it to her and she ate it and was killed, could be said that the accused who had given the poisoned sweetmeat to Appala Narasimhulu was not responsible for the death of Rajalakshmi? I think not. And there is really no difference between such a case and the present case. The ruling reported in 13 R. Cr. Letters, p. 2, also supports the view of the law which I have tried to express.

Reference has been made to the English Law on the point and though the case must be decided solely upon the provisions of the Indian Penal Code, I may observe that there can be no doubt that under the English Law as well the accused would be guilty of murder. In English Law it is sufficient to show that the act by which death was caused was done with malice aforethought, and it is not necessary that malice should be towards the person whose death has been actually caused. This is well illustrated in the well-known case of ***Agnes Gore*** and in ***Saunder***case and also in ***Regina* v. *Michael***. No doubt "malice aforethought," at least according to the old interpretation of it as including an intention to commit any felony, covers a wider ground in the English Law than the criminal intention or knowledge required by Sections 299 and 300, Indian Penal Code, but the law in Indian on the point in question in this case is undoubtedly, in my opinion, the same as in England.

Agreeing therefore with Benson J., I set aside the order of the Sessions Judge acquitting the accused of the charge of murder and convict him of an offence under Section 302, Indian Penal Code. I also agree with him that, in the circumstances of the case, it is not necessary to impose upon the accused the extreme penalty of the law, and I sentence the accused under Section 302, Indian Penal Code, to transportation for life.

* * * * *

Virsa Singh v. *State of Punjab*

AIR 1958 SC 465 : 1958 SCR 1495

VIVIAN BOSE, J. - The appellant Virsa Singh has been sentenced to imprisonment for life under Section 302 of the Indian Penal Code for the murder of one Khem Singh. He was granted special leave to appeal by this Court but the leave is limited to "the question that on the finding accepted by the Punjab High Court what offence is made out as having been committed by the petitioner."

2. The appellant was tried with five others under Sections 302/149, 324/149 and 323/149 of the Indian Penal Code. He was also charged individually under Section 302.

3. The others were acquitted of the murder charge by the first court but were convicted under Sections 326, 324 and 323 read with Section 149 of the Indian Penal Code. On appeal to the High Court they were all acquitted.

4. The appellant was convicted by the first court under Section 302 and his conviction and sentence were upheld by the High Court.

5. There was only one injury on Khem Singh and both Courts are agreed that the appellant caused it. It was caused as the result of a spear thrust and the doctor who examined Khem Singh, while he was still alive, said that it was "a punctured wound 2" x ½" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal."

He also said that "Three coils of intestines were coming out of the wound."

6. The incident occurred about 8 p.m. on 13-7-1955. Khem Singh died about 5 p.m. the following day.

7. The doctor who conducted the post-mortem described the injury as -

> An oblique incised stitched wound 2½" on the lower part of left side of belly, 1¾" above the left inguinal ligament. The injury was through the whole thickness of the abdominal wall. Peritonitis was present and there was digested food in that cavity. Flakes of pus were sticking round the small intestines and there were six cuts … at various places, and digested food was flowing out from three cuts.

The doctor said that the injury was sufficient to cause death in the ordinary course of nature.

8. The learned Sessions Judge found that the appellant was 21 or 22 years old and said -

> When the common object of the assembly seems to have been to cause grievous hurts only, I do not suppose Virsa Singh actually had the intention to cause the death of Khem Singh, but by a rash and silly act he gave a rather forceful blow, which ultimately caused his death. Peritonitis also supervened and that hastened the death of Khem Singh. But for that Khem Singh may perhaps not have died or may have lived a little longer.

Based on those facts, he said that the case fell under Section 300 "thirdly" and so he convicted under Section 302 of the Indian Penal Code.

9. The learned High Court Judges considered that "the whole affair was sudden and occurred on a chance meeting". But they accepted the finding that the appellant inflicted the injury on Khem Singh and accepted the medical testimony that the blow was a fatal one.

10. It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300 "thirdly" was quoted:

> If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death".

11. This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly" would be unnecessary because the act would fall under the first part of the section, namely—

> If the act by which the death is caused is done with the intention of causing death.

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

> If it is done with the intention of causing bodily injury to any person.

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction: to that extent the enquiry is objective; but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present.

12. Once that is found, the enquiry shifts to the next clause -

> And the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining— "and the bodily injury intended to be inflicted" is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

13. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly";

15. First, it must establish, quite objectively, that a bodily injury is present;

16. Secondly, the nature of the injury must be proved; These are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and,

19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

20. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

21. We were referred to a decision of Lord Goddard in ***R.*** **v.** ***Steane*** [(1947) 1 All ER 813, 816] where the learned Chief Justice says that where a particular intent must be laid and charged, that particular intent must be proved. Of course it must, and of course it must be proved by the prosecution. The only question here is what is the extent and nature of the intent that Section 300 "thirdly" requires, and how is it to be proved?

22. The learned counsel for the appellant next relied on a passage where the learned Chief Justice says that:

> If, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

We agree that that is also the law in India. But so is this. We quote a few sentences earlier from the same learned judgment:

> No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged.

That is exactly the position here. No evidence or explanation is given about why the appellant thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places. In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other evidence about the nature and seriousness of the injury.

23. The learned counsel for the appellant referred us to ***Emperor* v. *Sardarkhan Jaridkhan*** [(1917) ILR 41 Bom 27, 29] where Beaman, J., says that -

> Where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended.

With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

24. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be, but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guesswork and fanciful conjecture.

25. The appeal is dismissed.

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State of A.P. v. *Rayavarapu Punnayya*

AIR 1977 SC 45 : (1976) 4 SCC 382

R.S. SARKARIA, J. - This appeal by special leave is directed against a judgment of the High Court of Andhra Pradesh. It arises out of these facts.

2. In Rompicheria village, there were factions belonging to three major communities, viz., Reddys, Kammas and Bhatrajus. Rayavarapu (Respondent 1 herein) was the leader of Kamma faction, while Choppa-rapu Subbareddi was the leader of the Reddys. In politics, the Reddys were supporting the Congress party, while Kammas were supporters of the Swatantra party. There was bad blood between the two factions which were proceeded against under Section 107,Cr. P. C. In the panchayat elections of 1954, a clash took place between the two parties. A member of the Kamma faction was murdered. Consequently, nine persons belonging to the Reddy faction were prosecuted for that murder. Other incidents also took place in which these warring factions were involved. So much so, a punitive police force was stationed in this village to keep the peace during the period from March 1966 to September 1967. Sarikonda Kotam-Raju, the deceased person in the instant case, was the leader of Bhatrajus. In order to devise protective measures against the onslaughts of their opponents, the Bhatrajus held a meeting at the house of the deceased, wherein they resolved to defend themselves against the aggressive actions of thf The passage to this cattle shed was blocked by the other party. The deceased took PW 1 to police station Nekarikal and got a report lodged there. On July 22, 1968 the Sub-Inspector of Police came to the village and inspected the disputed wall in the presence of the parties. The Sub-Inspector went away directing both the parties to come to the police station on the following morning so that a compromise might be effected.

3.Another case arising out of a report made to the police by one Kallam Kotireddi against Accused 2 and 3 and another in respect of offences under Sections 324, 323 and 325, Penal Code was pending before a magistrate at Narasaraopet and the next date for hearing fixed in that case was July 23, 1968.

4.On the morning of July 23, 1968, at about 6.30 a.m., PWs 1 and 2 and the deceased boarded bus No. APZ 2607 at Rompicheria for going to Nekarikal. Some minutes later, Accused 1 to 5 (hereinafter referred to as Al, A2, A3, A4 and A5) also got into the same bus. The accused had obtained tickets for proceeding to Narasaraopet. When the bus stopped at Nekarikal crossroads, at about 7.30 a.m., the deceased and his companions alighted for going to the police station. The five accused also got down. The deceased and PW 1 went towards a choultry run by PW 4, while PW 2 went to the roadside to ease himself. Al and A2 went towards the Coffee Hotel, situated near the choultry. From there, they picked up heavy sticks and went after the deceased into the choultry. On seeing the accused, PW 1 ran away towards a hut nearby. The deceased stood up. He was an old man of 55 years. He was not allowed to run. Despite the entreaties made by the deceased with folded hands, Al and A2 indiscriminately pounded the legs and arms of the deceased. One of the bystanders, PW 6 asked the assailants as to why they were mercilessly beating a human being, as if he were a buffalo. The assailants angrily retorted that the witness was nobody to question them and continued the beating till the deceased became unconscious. The accused then threw their sticks at the spot, boarded another vehicle, and went away. The occurrence was witnessed by PWs 1 to 7. The victim was removed

by PW 8 to NarasaraopetHospital in a tempo-car. There, at about 8.45 a.m., Doctor Konda Reddy examined him and found 19 injuries, out of which, no less than 9 were (internally) found to be grievous. They were:

1. Dislocation of distal end of proximal phalar; left middle finger.
2. Fracture of right radius in its middle.
3. Dislocation of lower end of right ulna.
4. Fracture of lower end ofright femur.
5. Fracture of medial malleolus of right tibia.
6. Fracture of lower 1/3 of right fibula.
7. Dislocation of lower end of left ulna.
8. Fracture of upper end of left tibia.
9. Fracture of right patella.

5.Finding the condition of the injured serious, the doctor sent information to the Judicial Magistrate for getting his dying declaration recorded. On Dr K. Reddy's advice, the deceased was immediately removed to the GunturHospital where he was examined and given medical aid by Dr Sastri. His dying declaration, Ex P-5 was also recorded there by a magistrate (PW 10) at about 8.05 p.m. The deceased, however, succumbed to his injuries at about 4.40 a.m. on July 24, 1968, despite medical aid.

6. The autopsy was conducted by Dr P. S. Sarojini (PW 12) in whose opinion, the injuries found on the deceased were cumulatively sufficient to cause death in the ordinary course of nature. The cause of death, according to the doctor, was shock and haemorrhage resulting from multiple injuries. The trial Judge convicted Al and A2 under Section 302 as well as under Section 302 read with Section 34, Penal Code and sentenced each of them to imprisonment for life. On appeal by the convicts, the High Court altered their conviction to one under Section 304, Part II, Penal Code and reduced their sentence to five years' rigorous imprisonment, each. Aggrieved by the judgment of the High Court, the State has come in appeal to this Court after obtaining special leave. A1, Rayavarappu Punnayya (Respondent 1) has, as reported by his counsel, died during the pendency of this appeal. This information is not contradicted by the counsel appearing for the State. This appeal therefore, in so far as it relates to Al, abates. The appeal against A2 (Respondent 2), however, survives for decision.

11.The principal question that falls to be considered in this appeal is, whether the offence disclosed by the facts and circumstances established by the prosecution against the respondent, is 'murder' or 'culpable homicide not amounting to murder'.

12. In the scheme of the Penal Code, 'culpable homicide' is the genus and 'murder' is its species. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' *sans* 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is what may be called, 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The *second* may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences. (See table).

14.Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the *mens rea* requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (*b*) appended to Section 300.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done —
	INTENTION
(*a*) With the intention of causing death; or	(1) With the intention of causing death; or
(b) With the intention of causing such bodily injury as is *likely to cause death*; or	(2) With the intention of causing such bodily injury *as the offender knows* to be likely to cause the *death of the person* to whom the harm is caused; (3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature to cause death*; or
	KNOWLEDGE
(*c*) With the *knowledge* that the act is *likely* to cause death	(4) With the *knowledge* that the act is so *imminently dangerous* that it must in *all probability* cause death or such bodily injury as is *likely to cause death* and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or, diseased heart and such blow is likely to cause death of

that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16.In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17.For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. ***Rajwant* v. *State of Kerala*** [AIR 1966 SC 1874] is an apt illustration of this point.

18.In ***Virsa Singh* v. *State of Punjab*** [AIR 1958 SC 465] Vivian Bose, J., speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

> The prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

19. Thus according to the rule laid down in ***Virsa Singh***case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be 'murder'. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general - as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical

certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21.From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is the stage at which the court should determine whether the facts proved by the prosecution, bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to thisquestion is in the negative, the offence would be 'culpable homicide not amounting to murder', punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

24.It is not disputed that the death of the deceased was caused by the accused, there being a direct causal connection between the beating administered by Al and A2 to the deceased and his death. The accused confined the beating to the legs and arms of the deceased, and therefore, it can be said that they perhaps, had no "intention to cause death" within the contemplation of clause (a) of Section 299 or clause (1) of Section 300. It is nobody's case that the instant case falls within clause (4) of Section 300. This clause, as already noticed, is designed for that class of cases where the act of the offender is not directed against any particular individual but there is in his act that recklessness and risk of imminent danger, knowingly and unjustifiably incurred, which is directed against the man in general, and places the lives of many in jeopardy. Indeed, in all fairness, Counsel for the appellant has not contended that the case would fall under clause (4) of Section 300. His sole contention is that even if the accused had no intention to cause death, the facts established fully bring the case within the purview of clause (3) of Section 300 and, as such, the offence committed is murder and nothing less. In support of this contention reference has been made to ***Anda*v. *State of Rajasthan*** [AIR 1966 SC 148] and ***Rajwant Singh* v. *State of Kerala*.**

25.As against this, Counsel for the respondent submits that since the accused selected only non-vital parts of the body of the deceased, for inflicting the injuries, they could not be attributed the *mens rea* requisite for bringing the case under clause (3) of Section 300; at the most, it could be said that they had *knowledge* that the injuries inflicted by them were likely to

cause death, and as such, the case falls within the third clause of Section 299 and the offence committed was only "culpable homicide not amounting to murder", punishable under Section 304, Part II. Counsel has thus tried to support the reasoning of the High Court.

26.The trial Court, as already noticed, had convicted the respondent of the offence of murder. It applied the rule in ***Virsa Singh***case and the ratio of ***Anda* v. *State*** and held that the case was clearly covered by clause thirdly of Section 300. The High Court has disagreed with the trial court and held that the offence was not 'murder' but 'one under Section 304, Part II'.

27. The High Court reached this conclusion on the following reasoning:

(a) There was no premeditation in the attack. It was almost an impulsive act.

(b) Though there were 21 injuries, they were all on the arms and the legs; and not on the head or other vital parts of the body.

(c) There was no compound fracture to result in heavy haemorrhage; their must have been some bleeding (which) according to PW1, might have stopped within about half an hour to one hour.

(d) Death that had occurred 21 hours later, could have been only due to shock and not due to haemorrhage also, as stated by PW 12…who conducted the autopsy. This reference is strengthened by the evidence of PW 26 who says that the patient was under shock and he was treating him for shock by sending fluids through his vein. From the injuries inflicted the accused, therefore, could not have intended to cause death.

(e) Al and A2 had beaten the deceased with heavy sticks. These beatings had resulted in fracture of the right radius, right femur, right tibia, right fibula, right patella and left tibia and dislocation of… therefore considerable force must have been used while inflicting the blows. Accused 1 and 2 should have therefore inflicted these injuries with the knowledge that they are likely, by so beating, to cause the death of the deceased, though they might not have had the knowledge that they were so imminently dangerous that in all probability their acts would result in such injuries as are likely to cause the death. The offence is therefore culpable homicide falling under Section 299, I.P.C. punishable under Section 304 Part II and not murder.

28.With respect, we are unable to appreciate and accept this reasoning. It appears to us to be inconsistent, erroneous and largely speculative.

29.To say that the attack was not premeditated or pre-planned is not only factually incorrect but also at war with the High Court's own finding that the injuries were caused to the deceased in furtherance of the common intention of Al and A2 and therefore, Section 34**,**I.P.C.was applicable. Further, the finding that there was no compound fracture, no heavy haemorrhage and the cause of the death was shock only, is not in accord with the evidence on the record. The best person to speak about haemorrhage and the cause of the death was Dr P. S. Sarojini who had conducted the autopsy. She testified that the cause of death of the deceased was "shock and haemorrhage due to multiple injuries". This categorical opinion of the doctor was not assailed in cross-examination. In the post-mortem examination report Ex. P-8, the doctor noted that the heart of the deceased was found full of clotted blood. Again, in injury 6, which also was an internal fracture, the bone was visible through the wound. Dr D. A. Sastri had testified that he was treating Kotamraju injured of shock, not only by sending fluids through his vein *but also blood.* This part of his statement wherein he spoke about the giving of blood transfusion to the

deceased, appears to have been overlooked by the High Court. Dr Kona Reddy, who was the first medical officer to examine the injuries of the deceased, had noted that there was *bleeding* and swelling around injury 6 which was located on the left leg 3 inches above the ankle. Dr Sarojini, PW 12, found fracture of the left tibia underneath this injury. There could therefore, be no doubt that this was a compound fracture. PW 11 found bleeding from the other abraded injuries, also. He, however, found the condition of the injured grave and immediately sent information to the magistrate for recording his dying declaration. PW 11 also advised immediate removal of the deceased to the bigger hospital at Güntur. There also, Dr Astir finding that life in the patient was ebbing fast took immediate twofold action. First, he put the patient on blood transfusion. Second, he sent intimation for recording his dying declaration. A magistrate (PW 10) came there and recorded the statement. These are all telltale circumstances which unerringly show that there was substantial haemorrhage from some of the injuries involving compound fractures. This being the case, there was absolutely no reason to doubt the sworn word of the doctor (PW 12) that the cause of the death was shock *and* haemorrhage.

30.Although the learned judges of the High Court have not specifically referred to the quotation from page 289 of Modi's book on ***Medical Jurisprudence and Toxicology*** [(1961 Edn.)] which was put to Dr Sarojini in cross-examination, they appear to have derived support from the same for the argument that fractures of such bones 'are not ordinarily dangerous'; therefore, the accused could not have intended to cause death but had only knowledge that they were likely by such beating to cause the death of the deceased.

31.It will be worthwhile to extract that quotation from Modi,asa reference to the same was made by Mr Subba Rao before us, also. According to Modi, "Fractures are not ordinarily dangerous unless they are compound, when death may occur from loss of blood, if a big vessel is wounded by the split end of a fractured bone".

32.It may be noted, in the first place, that this opinion of the learned author is couched in too general and wide language. Fractures of some vital bones, such as those of the skull and the vertebral column are generally known to be dangerous to life. Secondly, even this general statement has been qualified by the learned author, by saying that compound fractures involving haemorrhage, are ordinarily dangerous. We have seen that some of the fractures underneath the injuries of the deceased were compound fractures accompanied by substantial haemorrhage. In the face of this finding, Modi's opinion far from advancing the contention of the defence, discounts it.

33.The High Court has held that the accused had no intention to cause death because they deliberately avoided to hit any vital part of the body, and confined the beating to the legs and arms of the deceased. There is much that can be said in support of this particular finding. But that finding - assuming it be correct - does not necessarily take the case out of the definition of 'murder'. The crux of the matter is, whether the facts established bring the case within clause thirdly of Section 300. This question further narrows down into a consideration of the twofold issue:

(*i*) Whether the bodily injuries found on the deceased were intentionally inflicted by the accused?

(*ii*) If 'so, were they sufficient to cause death in the ordinary course of nature? If both these elements are satisfactorily established, the offence will be 'murder', irrespective of

the fact whether an intention on the part of the deceased to cause death, had or had not been proved.

34.In the instant case, the existence of both these elements was clearly established by the prosecution. There was bitter hostility between the warring factions to which the accused and the deceased belonged. Criminal litigation was going on between these factions since long. Both the factions had been proceeded against under Section 207, Cr. P. C. The accused had, therefore, a motive to beat the deceased. The attack was premeditated and pre-planned, although the interval between the conception and execution of the plan was not very long. The accused had purchased tickets for going further to Narasaraopet, but on seeing the deceased, their *bete noire,* alighting at Nekarikal, they designedly got down there and trailed him. They selected heavy sticks about 3 inches in diameter, each, and with those lethal weapons, despite the entreaties of the deceased, mercilessly pounded his legs and arms, causing no less than 19 or 20 injuries, smashing at least seven bones, mostly major bones, and dislocating two more. The beating was administered in a brutal and reckless manner. It was pressed home with an unusually fierce, cruel and sadistic determination. When the human conscience of one of the shocked bystanders spontaneously cried out in protest as to why the accused were beating a human being as if he were a buffalo, the only echo it could draw from the assailants was a menacing retort, who callously continued their malevolent action, and did not stop the beating till the deceased became unconscious. Maybe, the intention of the accused was to cause death and they stopped the beating under the impression that the deceased was dead. But this lone circumstance cannot take this possible inference to the plane of positive proof. Nevertheless, the formidable weapons used by the accused in the beating, the savage manner of its execution, the helpless state of the unarmed victim, the intensity of the violence caused, the callous conduct of the accused in persisting in the assault even against the protest of feeling bystanders - all, viewed against the background of previous animosity between the parties, irresistibly lead to the conclusion that the injuries caused by the accused to the deceased were intentionally inflicted, and were not accidental. Thus the presence of the first element of clause thirdly of Section 300 had been cogently and convincingly established.

35.This takes us to the second element of clause (3). Dr Sarojini, PW 12, testified that the injuries of the deceased were cumulatively sufficient in the ordinary course of nature to cause death. In her opinion - which we have found to be entirely trustworthy - the cause of the death was shock and haemorrhage due to the multiple injuries. Dr Sarojini had conducted the post-mortem examination of the dead body of the deceased. She had dissected the body and examined the injuries to the internal organs. She was, therefore, the best informed expert who could opine with authority as to the cause of the death and as to the sufficiency or otherwise of the injuries from which the death ensued. Dr Sarojini's evidence on this point stood on a better footing than that of the doctors (PWs 11 and 26) who had externally examined the deceased in his lifetime. Despite this position, the High Court has not specifically considered the evidence of Dr Sarojini with regard to the sufficiency of the injuries to cause death in the ordinary course of nature. There is no reason why Dr Sarojini's evidence with regard to the second element of clause (3) of Section 300 be not accepted. Dr Sarojini's evidence satisfactorily establishes the presence of the second element of this clause.

36.There is, therefore, no escape from the conclusion, that the offence committed by the accused was ‘murder’, notwithstanding the fact that the intention of the accused to cause death has not been shown beyond doubt.

37.In ***Anda*** **v.** ***State of Rajasthan***, this Court had to deal with a very similar situation. In that case, several accused beat the victim with sticks after dragging him into a house and caused multiple injuries including 16 lacerated wounds on the arms and legs, a haematoma on the forehead and a bruise on the chest. Under these injuries to the arms and legs lay fractures of the right and left ulnas, second and third metacarpal bones on the right hand and second metacarpal bone of the left hand, compound fractures of the right tibia and right fibula. There was loss of blood from the injuries. The medical officer who conducted the autopsy opined that the cause of the death was shock and syncope due to multiple injuries; that all the injuries collectively could be sufficient to cause death in the ordinary course of nature, but individually none of them was so sufficient.

38.Question arose whether in such a case when no significant injury had been inflicted on a vital part of the body, and the weapons used were ordinary lathis, and the accused could not be said to have the intention of causing death, the offence would be ‘murder’ or merely ‘culpable homicide not amounting to murder’. This Court, speaking through Hidaytullah, J. (as he then was) after explaining the comparative scope of and the distinction between Sections 299 and 300, answered the question in these terms:

> The injuries were not on a vital part of the body and no weapon was used which can be described as specially dangerous. Only lathis were used. It cannot, therefore, be said safely that there was an intention to cause the death of Bherun within the first clause of Section 300. At the same time, it is obvious that his hands and legs were smashed and numerous bruises and lacerated wounds were caused. The number of injuries shows that everyone joined in beating him. It is also clear that the assailants aimed at breaking his arms and legs. Looking at the injuries caused to Bherun in furtherance of the common intention of all it is clear that the injuries intended to be caused were sufficient to cause death in the ordinary course of nature even if it cannot be said that his death was intended. This is sufficient to bring the case within thirdly of Section 300.

39.The ratio of ***Anda*** **v.** ***Stateof Rajasthan***applies in full force to the facts of the present case. Here, a direct causal connection between the act of the accused and the death was established. The injuries were the direct cause of the death. No secondary factor such as gangrene, tetanus, etc., supervened. There was no doubt whatever that the beating was premeditated and calculated. Just as in ***Anda***case, here also, the aim of the assailants was to smash the arms and legs of the deceased, and they succeeded in that design, causing no less than 19 injuries, including fractures of most of the bones of the legs and the arms. While in ***Anda*** case, the sticks used by the assailants were not specially dangerous, in the instant case they were unusually heavy, lethal weapons. All these acts of the accused were pre-planned and intentional, which, considered objectively in the light of the medical evidence, were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the

application of clause thirdly of Section 300. The expression "bodily injury" in clause thirdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The sufficiency spoken of in this clause, as already noticed, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under clause thirdly of Section 300. All the conditions which are a prerequisite for the applicability of this clause have been established and the offence committed by the accused in the instant case was 'murder'.

40.For all the foregoing reasons, we are of the opinion that the High Court was in error in altering the conviction of the accused-respondent from one under Sections 302, 302/34 to that under Section 304, Part II, Penal Code. Accordingly, we allow this appeal and restore the order of the trial court convicting the accused (Respondent 2 herein) for the offence of murder, with a sentence of imprisonment for life. Respondent 2, if he is not already in jail, shall be arrested and committed to prison to serve out the sentence inflicted on him.

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Emperor v. *Mt. Dhirajia*

AIR 1940 All. 486

BRAUND, J. – This is an appeal of some little interest. The appellant is a young woman of 20 who was tried for murder by the Sessions Judge of Benares and who was tried at the same time for attempted suicide by a jury. The result of the trial by the Sessions Judge with the aid of his assessors – who were of course the same people who constituted the jury – was that he convicted the appellant of murder under Section 302, I.P.C. The result of the trial for attempted suicide by the jury was that she was found not guilty. The learned Judge, as logically he was bound to do, was unable to agree with the verdict of not guilty upon the charge of attempted suicide and he has therefore referred the case to us under Section 307, Criminal P.C., with the recommendation that the jury's verdict should be set aside and that the appellant should be convicted under Section 309, I.P.C., as well as under Section 302. In this way we have before us the appellant's own appeal against her conviction and sentence under Section 302, I.P.C., and the learned Sessions Judge's reference recommending us to set aside the verdict of the jury and to substitute a conviction upon the charge of attempted suicide as well.

We need hardly say that this is one of those cases common in these provinces in which a young woman with her baby in her arms had jumped or fallen down a well. The facts of the case are comparatively simple. Mt.Dhirajia is a young woman married to a man named Jhagga. They had a six months old baby. They lived together in the village and we can accept it as a fact from the evidence that the husband did not treat his wife very well. We find as a fact that on the day in question there had been a quarrel between the husband and wife and that the husband Jhagga had uttered threats against his wife that he would beat her. There is more than a hint in the evidence that the wife desired to go to visit her parents at their village of Bhagatua and that the husband, as husbands sometimes do, objected to his wife going to her parents. Late that night Jhagga woke up and found his wife and the baby missing. He went out in pursuit of them and then he reached a point close to the railway line he saw making her way along the path. When she heard him coming after her Mt.Dhirajia turned round in a panic, ran a little distance with the baby girl in her arms and then either jumped or fell into an open well which was at some little distance from the path. It is important to observe that obviously she did this in panic because we have the clearest possible evidence that she looked behind her and was evidently running away from her husband. The result was, to put it briefly, that the little child died while the woman was eventually rescued and suffered little or no injury. Upon these facts Mr. Dhirajia was, as we have said, charged with the murder of her baby and with an attempt to commit suicide herself. At that stage it is desirable that we should look at her own statements. She has put forward her version of the affair on these separate occasions: first by a statement in the nature of the confession; secondly, before the committing Magistrate, and thirdly in the Court of the Sessions Judge. The first two of these are identical and we need only, therefore, actually discuss the one before the Magistrate. She was asked:

> Did you on 9th August 1939 at about sunrise jump into the well at Sultanpur in order to commit suicide?

This was her answer:

> There had been a quarrel in my house for three or four days. My husband threatened to beat me. Thereupon I fled away. He followed me. When I saw my husband coming after me, I through fear jumped into the well.

And later in another answer she said:

> Yes, I jumped into the well. I did not know that she would die (by doing so). I jumped into the well through fear of my husband.

That was perfectly clear and to our minds, quite straightforward statement of fact and we cannot but regret that in the Sessions Court her statement was changed. There – possibly on advice – she changed her story and alleged that she did not jump into the well at all but fell into it by accident. In those circumstances she was tried. The only issue to which the learned Sessions Judge appears to have addressed his mind, either in his own deliberations upon the charge under Section 302 or in his charge to the jury under Section 309 was whether as a factMt. Dhirajia jumped into the well or fell into it. His conclusion as expressed in his own judgment is:

> I am, therefore, of the opinion that the evidence of Jhagga supported as it is by the two previous statements of the accused, clearly shows that the accused had jumped down into the well and had not fallen down accidentally.

He then assumes that it is a case of murder. In the same way the whole purport of his charge to the jury was that they had merely to decide whether she had jumped deliberately or fallen by accident into the well. We ourselves, having read the evidence with considerable care, are satisfied that the story of the falling into the well by accident is not true. We are satisfied upon the fact the story told by the appellant in her own statement before the Magistrate is in substance the true version of what happened. It is, indeed, supported by the prosecution evidence itself because one cannot read her husband's evidence without coming to the conclusion that the woman was in a panic when she saw her husband coming after her. And we believe that what she did, she did in terror for the purpose of escaping from her husband.

Now, upon those facts, what we have to consider – and what we think the learned Sessions Judge ought to have considered – is, whether this satisfied the charges of murder and of attempted suicide, and if not what the woman has been guilty of. This raises questions which are not altogether free from difficulty and are of some interest. To take first the charge of murder, as we all know, according to the scheme of the Penal Code, 'murder' is merely a particular form of culpable homicide, and one has to look first to see in every murder case whether there was culpable homicide at all. If culpable homicide is present then the next thing to consider is whether it is of that type which under Section 300, Penal Code, is designated 'murder' or whether it falls within the residue of cases which are covered by Section 304 and are designated 'culpable homicide not amounting to murder.' In order to ascertain whether the case is one of culpable homicide we have to look at Section 299, Penal Code, which says:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

In this case we can say it at once that we do not, on the facts, attribute to Mt.Dhirajia an intention to cause the death of her baby. We are satisfied that no such intention was ever present in her mind. Indeed we think there was no room in her mind for any such intention having regard to the panic that she was in. But we have to consider whether what she did, she did with the 'knowledge' that she was likely by such act to cause death. It has been strongly and very ably argued before us by Mr. Shekhar Saran that we cannot in this case, having regard to all the circumstances, attribute to this unfortunate woman the 'knowledge' of anything at all at that particular moment. We desire to pause at this point to say that Mr. Shekhar Saran, who is holding the brief on behalf of the Government, has very properly and with great ability represented the appellant herself who was not otherwise represented. We are grateful for his argument from which we have derived great assistance. The way he puts it is that we must treat this woman as being in such a state of mind that not only could she have had no 'intention' but she could have had no knowledge either. We regret that we are unable to go as far as this. 'Intention' appears to us to be one thing and 'knowledge' appears to us to be a different thing. In order to possess and to form an intention there must be a capacity for reason. And when by some extraneous force the capacity for reason has been ousted, it seems to us that the capacity to form an intention must have been unseated too. But to our minds, knowledge stands upon a different footing. Some degree of knowledge must, we think, be attributed to every sane person. Obviously, the degree of knowledge which any particular person can be assumed to possess must vary. For instance, we cannot attribute the same degree of knowledge to an uneducated as to an educated person. But we think that to some extent knowledge must be attributed to everyone who is sane. And what we have to consider here is whether it is possible for us – treating Mt.Dhirajia as a sane person, which we are bound to do – to conclude that she could possibly have been ignorant of the fact that the act of jumping into a well with a baby in her arms was likely to cause that baby's death. We do not think we can.

We think that however primitive a man or woman may be, and however frightened he or she may be, knowledge of the likely consequence of so imminently dangerous an act must be supposed to have remained with him or her. We have been pressed with cases by Mr. Saran in which when blows have been struck, it has been discussed whether knowledge of the likely consequence of those blows can be attributed to the striker. But we venture to think that such cases as these are fundamentally different from the case before us. A blow is not per se a necessarily fatal act, especially if the blow be given with the fist or with one of the less lethal weapons. This is a question of degree, a question of force, a question of position and so forth, and therefore in these cases there is ample room for argument as to whether in any particular case, having regard to the manner in which the particular blow or blows in that case was or were delivered, there was behind it knowledge that it was likely to result in death. But, in this case, the character of the act is in our opinion, fundamentally different. The act of jumping into a well with a six-month old baby in one's arms can, in our opinion, but for a miracle, have only one conclusion and we regret that we have to assume that that consequence must have been within the knowledge, but not within the intention of Mt.Dhirajia.

For these reasons we think that this was a case of culpable homicide. We must now proceed to consider whether or not it was murder. We do not propose to set out verbatim the whole of Section 300, I.P.C., because it is so well known. It provides that in four cases culpable homicide

is always murder, subject to certain specified exceptions. The first three cases in which culpable homicide is designated as murder are all cases in which there is found a positive 'intention' in the doer of the act. We need not waste time on these because, as we have already said, we do not think that in the circumstances of this case it is possible to attribute to Mt.Dhirajia any positive or active intention at all. The only case we need discuss is the fourth which is in these words:

> If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

That is the fourth case in which culpable homicide is murder. We have already found that Mr. Dhirajia must be taken to have known that what she did must in all probability cause the death of her baby. But this is qualified by the further requirement that "such act" must be "without any excuse for incurring the risk of causing death …." The construction of this particular passage of Section 300 is well settled. It is well settled that it is not murder merely to cause death by doing an act with the knowledge that it must in all probability cause death. In order that an act done with such knowledge should constitute murder it is necessary that it should be committed without any excuse for incurring the risk of causing the death or bodily injury. An act done with the knowledge of its consequences is not prima facie murder. It becomes murder only if it can be positively affirmed that there was no excuse. The requirements of the section are not satisfied by the act of homicide being one of extreme recklessness. It must in addition be wholly inexcusable. When a risk is incurred – even a risk of the gravest possible character which must normally result in death – the taking of that risk is not murder unless it was inexcusable to take it. That, as we understand it, in terms of this case, is the meaning of this passage of Section 300, I.P.C. Now looking at the facts of this case which we need not repeat again, we think that it is not possible to say that Mt.Dhirajia in jumping into this well did so without excuse. We must consider in assessing what is excuse or is not excuse the state of mind she was in. She feared her husband and she had reason to fear her husband. She was endeavouring to escape from him at dawn and in the panic into which she was thrown when she saw him behind her she jumped into the well. We think she had excuse and that that excuse was panic or fright or whatever you like to call it. For these reasons we do not think that Mt.Dhirajia is guilty of murder.

Upon this reasoning, however, we cannot escape from Section 304. It must inevitably follow, for reasons which are obvious, that Mt.Dhirajia is guilty of culpable homicide not amounting to murder and that, in our judgment, is the charge upon which she should have been convicted and not upon the charge of murder. Before we leave this part of the case we desire to refer to one more authority to which our attention has been called by Mr. Saran. That is ***Lukada* v. *Emperor*** [AIR 1925 Bom 310]. The case was a curious one in which a girl of 17 years of age, who too was ill-treated by her husband jumped with her baby into a well when she found that her husband prevented her from returning to her parents. In that case she was carrying the baby on her back and the learned Judges who tried it in the Bombay High Court on appeal came to the conclusion that on the facts of that case she was not aware at all that she even had a baby with her. No doubt upon the facts of that particular case that conclusion was justified. But we

desire to say that we are not ourselves prepared to apply it to the case before us. The facts in the case before us are different and we should not be justified, we think, in looking for evidence which does not exist in order to enable us to come to a conclusion which the facts do not warrant. There is nothing upon this record which could enable us upon any reasonable view of the matter to assume that Mt.Dhirajia was not aware that she had her baby with her. We have found it necessary to resist the temptation in this case to adopt the facts to what our own desires might be because we think that such a course must necessarily be dangerous and wrong.

As regards the charge of attempted suicide we think that upon that Mt.Dhirajia was rightly acquitted. To our minds, the word 'attempts' connotes some conscious endeavour to do the act which is the subject of the particular section. In this case the act was the act of committing suicide. We ask ourselves whether when Mt.Dhirajia jumped into the well, she did so in a conscious effort to take her own life. We do not think she did. She did so in an effort to escape from her husband. The taking of her own life was not, we think, for one moment present to her mind. For that reason we think that Mt.Dhirajia was rightly acquitted under Section 309, I.P.C. So far as the convictions are concerned, therefore, the result of the appeal is that the appellant's conviction under Section 302, I.P.C. is set aside and there is substituted for it a conviction under Section 304, I.P.C. So far as the learned Judge's reference to us is concerned, we are unable to accept it and the verdict of not guilty passed by the jury must stand.

There only remains the question of sentence upon the conviction under Section 304 which we have substituted for the conviction under Section 302, I.P.C. It is obvious that this is not a case deserving of a severe punishment. The unfortunate woman has already been in prison for a period of eight months and we think the proper sentence is that she should be sentenced to undergo six months' rigorous imprisonment which in effect means that she will be at once released unless she is required upon some other charge. Order accordingly.

* * * * *

Gyarsibai v. *The State*

AIR 1953 M.B. 61

DIXIT, J..- The appellant has been convicted by the Sessions Judge of Shajapur of an offence under Section 302, Penal Code, for the murder of her three children and also of an offence under Section 309, Penal Code, for an attempt to commit suicide. She has been sentenced to transportation for life under Section 302, Penal Code, and to six months' simple imprisonment under Section 309, Penal Code. Both these sentences have been directed to run concurrently. She has now preferred this appeal from jail against the convictions and sentences.

2. The facts of this case are very simple. The prosecution alleged that the appellant, her children, her husband Jagannath and her sister-in-law Kaisar Bai used to reside together. There were constant quarrels between the appellant and her sister-in-law and very often Jagannath used to slap the appellant for picking up a quarrel with her sister-in-law Kaisar Bai. It is alleged that one such quarrel took place on the morning of 14-8-1951 when Jagannath was away from his home. In this quarrel Kaisar Bai asked the appellant to leave the house. Thereupon, the appellant left the house, taking her three children aged 7years, 5years and 1½ years and saying that on account of her sister-in-law she would jump into a well. Soon after, the appellant went to a well in the village and threw herself into the well along with her three children. A few hours after, some inhabitants of the village found Gyarasibai supporting herself on an edge of the well and the three children dead in the well. The appellant admitted before the Committing Magistrate as well as before the Sessions Judge that she jumped into the well together with her children on account of her sister-in-law Kaisar Bai's harassment.

3. The facts have been amply established by the prosecution evidence. From the statement of Kaisar Bai and Narayan it is clear that on the morning of the day of occurrence, there was a quarrel between Kaisar Bai and Gyarasi Bai and during this quarrel when Kaisar Bai asked the appellant to leave the house, she left the house with her three children saying that she would jump into a well. Kaisar Bai also admits that some times Jagannath used to give two or three slaps to the appellant for quarrelling with her. The other prosecution witnesses deposed to the recovery of the bodies of three children and to the rescue of the appellant. There is no eye witness of the fact that the appellant jumped down the well herself together with her three children. But from the statements of Kaisar Bai, Narayan and the statement of the appellant herself before the Committing Magistrate and the Sessions Judge, I am satisfied that the version given by the appellant in her own statement is correct and that she jumped into the well herself along with her three children in order to escape harassment at the hands of her sister-in-law Kaisar Bai.

4. On these facts the only question that arises for consideration is whether act of the appellant in jumping down into a well together with her three children is murder. I think this act of the appellant clearly falls under the 4th clause of Section 300, Penal Code which defines murder. On the facts it is clear that the appellant Gyarasi Bai had no intention to cause the death of any of her children and she jumped into the well not with the intention of killing her children but with the intention of committing suicide. That being so, Clauses. 1, 2 and 3 of Section 300, Penal Code, which apply to cases in which death is caused by an act done with the intention of

causing death or causing such bodily injury as is likely to cause the death of person or sufficient in the ordinary course of nature to cause death cannot be applied to the present case. The only clause of Section 300, Penal Code, which then remains for consideration is the 4th clause. This clause says:

> If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

5. It will be seen from this clause that if death is caused merely by doing an act with the knowledge that it is so imminently dangerous that it must, in all probability cause death, then the act is not murder as is defined in clause 4, but is mere culpable homicide not amounting to murder. In order that an act done with such knowledge should constitute murder, it is essential that it should have been committed "without any excuse for incurring the risk of causing death or such bodily injury". The question, therefore, is whether when the appellant jumped into the well together with her three children, she had the knowledge that her act was so imminently dangerous, as to cause in all probability the death of her children and further whether if she had such knowledge her act in jumping into a well with her children was "without any excuse for incurring the risk of causing death or such bodily injury as is mentioned in clause 4 of Section 300, Penal Code. Now I think it cannot be said in the present case, with any degree of force that when the appellant jumped into a well with her children she had not the knowledge that her act was so imminently dangerous as to cause the death of her children. Her life might have become unbearable owing to domestic troubles and perhaps on account of these troubles, she decided to take her own life. I am also prepared to hold that on account of the discord in the house, the appellant was subjected to severe exasperation and to a long course of conduct causing suffering and anxiety. But when on account of all these reasons, she left the house on the day of the occurrence saying that she would jump into a well with her children, it cannot be said that she was in such an abnormal state of mind that could not have any knowledge of the nature of her act.

Every sane person – and in this case we are bound to take it that the appellant was sane – is presumed to have some knowledge of the nature of his act. This knowledge is not negatived by any mental condition short of insanity. In my opinion, the act of the appellant in jumping into a well with her children is clearly one done by the appellant knowing that it must in all probability cause the death of her children. I do not find any circumstances to come to the conclusion that the appellant had some excuse for incurring the risk of causing the death of her children. The fact that there were quarrels between the appellant and her sister-in-law and that her life had become unbearable on account of this family discord, cannot be regarded as a valid justification for appellant's act of jumping into a well with her children.

The words used in clause 4 to Section 300, Penal Code are “without any excuse for incurring the risk of causing death or such injury as aforesaid”. These words indicate that the imminently dangerous act is not murder if it is done to prevent a greater evil. If the evil can be avoided without doing the act then there can be no valid justification for doing the act which is so imminently dangerous that it must, in all probability, cause death. Here there is no material, whatsoever, to come to the conclusion that the appellant could not have escaped the harassment

at the hands of her sister-in-law except by jumping herself into a well with her three children. I am, therefore, inclined to think that the appellant's act is clearly murder under clause 4 of Section 300, Penal Code.

6. I must, however, notice two cases in which the question of the offence constituted by an act of a woman deliberately jumping into a well with a child in circumstances somewhat different to those present in this case, has been considered. The first case is one reported in – ***Emperor* v. *Dhirajia*** [ILR (1940) All 647]. In this case a village woman left her home with her six months old baby in her arms on account of her husband's ill-treatment; after she had gone some distance from the home, she turned round and saw her husband pursuing her. She became panicky and jumped down into a well nearby with the baby in her arms. The baby died, but the woman survived. On these facts, the learned judges of the Allahabad High Court held that an intention to cause the death of the child could not be attributed with the knowledge that such an imminently dangerous act as jumping down the well was likely to cause the child's death.

But the learned judges held that considering the state of panic she was in, the culpable homicide did not amount to murder as there was an excuse for incurring the risk of causing death. Mst. Dhirajia was thus found guilty under Section 304, Penal Code. It is not necessary to consider whether upon the facts of that case, the conclusion that the woman was guilty of culpable homicide not amounting to murder was justified. But it must be observed that the learned judges of the Allahabad High Court thought that the fear of her husband and the panic into which she was thrown could be an excuse for incurring the risk of causing death. Here there is no question of any panic or fright of the appellant. It is, no doubt, true, as the learned Judges of the Allahabad High Court say that in assessing what is excuse or is not excuse, we must consider the state of mind in which the accused person was.

But I think in considering the question we must take into account the state of mind of a reasonable and legally sane person and then determine whether the risk of causing death could have been avoided. On this test, there can be no room for thinking in the present case that the appellant was justified in jumping into a well with her three children merely on account of her sister-in-law's attitude towards her. The other decision is of the Bombay High Court in – ***Supadi Lukada* v. *Emperor*** [AIR 1925 Bom 310]. In that case too, a girl of about 17 years of age who was carrying her baby on her back jumped into a well because her husband had ill-treated her and had prevented her from returning to her parents.

The learned judges of the Bombay High Court held that when the girl attempted to commit suicide by jumping into a well she could not be said to have been in a normal condition and was not, therefore, even aware of the child's presence and that as she was not conscious of the child, there was not such knowledge as to make Section 300 (4) applicable. The learned judges of the Bombay High Court found the girl guilty under Section 304-A. The Bombay case is clearly distinguishable on the facts. In the present case when the evidence shows that the appellant left her home saying that she would jump into a well with her three children, it cannot clearly be held that she was not aware that her children were with her. In my opinion, these two cases are not of much assistance to the appellant.

7. As regards the conviction of the appellant for an attempt to commit suicide, I think she has been rightly convicted of that offence. When she jumped into a well, she did so in a conscious effort to take her own life.

8. The appellant has been sentenced to transportation for life under Section 302, Penal Code. This is the only sentence which could legally be passed in this case. But having regard to the facts and circumstances of the case and also to the fact that the appellant, though not legally insane, was not and could not be in a normal state of mind when she jumped into a well with her three children, I think this is not a case deserving of a severe punishment. I would, therefore, recommend to the Government to commute the sentence of transportation for life to one of three years' rigorous imprisonment. The sentence of six months' simple imprisonment awarded to the appellant for the offence under Section 309 is appropriate.

9. In the result this appeal is dismissed.

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K. M. Nanavati v. *State of Maharashtra*

AIR 1962 SC 605

K. SUBBA RAO, J. - This appeal by special leave arises out of the judgment of the Bombay High Court sentencing Nanavati, the appellant, to life imprisonment for the murder of Prem Bhagwandas Ahuja, a businessman of Bombay.

2. This approval presents the common place problem of an alleged murder by an enraged husband of a paramour of his wife; but it aroused considerable interest in the public mind by reason of the publicity it received and the important constitutional point it had given rise to at the time of its admission.

3. The appellant was charged under Section 302 as well as under Section 304, Part I, of the Indian Penal Code and was tried by the Sessions Judge, Greater Bombay, with the aid of a special jury. The jury brought in a verdict of "not guilty" by 8: 1 under both the sections; but the Sessions Judge did not agree with the verdict of the jury, as in his view the majority verdict of the jury was such that no reasonable body of men could, having regard to the evidence, bring in such a verdict. The learned Sessions Judge submitted the case under Section 307 of the Code of Criminal Procedure to the Bombay High Court after recording the grounds for his opinion. The said reference was heard by a division bench of the said High Court consisting of Shelat and Naik, JJ. The two learned judges gave separate judgments, but agreed in holding that the accused was guilty of the offence of murder under Section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life. Shelat, J., having held that there were misdirections to the jury, reviewed the entire evidence and came to the conclusion that the accused was clearly guilty of the offence of murder; alternatively, he expressed the view that the verdict of the jury was perverse, unreasonable and, in any event, contrary to the weight of evidence. Naik J., preferred to base his conclusion on the alternative ground, namely, that no reasonable body of persons could have come to the conclusion arrived at by the jury. Both the learned Judges agreed that no case had been made out to reduce the offence from murder to culpable homicide not amounting to murder. The present appeal has been preferred against the said conviction and sentence.

4. The case of the prosecution may be stated thus: The accused, at the time of the alleged murder, was second in command of the Indian Naval Ship "Mysore". He married Sylvia in 1949 in the registry office at Portsmouth, England. They have three children by the marriage, a boy aged 9½ years, a girl aged 5½ years and another boy aged 3 years. Since the time of marriage, the couple were living at different places having regard to the exigencies of service of Nanavati. Finally, they shifted to Bombay. In the same city the deceased Ahuja was doing business in automobiles and was residing, along with his sister, in a building called "Shrevas" till 1957 and thereafter in another building called "Jivan Jyot" on Setalvad Road. In the year 1956, Agniks, who were common friends of Nanavatis and Ahujas, introduced Ahuja and his sister to Nanavatis. Ahuja was unmarried and was about 34 years of age at the time of his death. Nanavati, as a Naval Officer, was frequently going away from Bombay in his ship, leaving his wife and children in Bombay. Gradually, friendship developed between Ahuja and Sylvia, which culminated in illicit intimacy between them. On April 27, 1959, Sylvia confessed to Nanavati of her illicit intimacy with Ahuja. Enraged at the conduct of Ahuja, Nanavati went to

his ship, took from the stores of the ship a semi-automatic revolver and six cartridges on a false pretext, loaded the same, went to the flat of Ahuja, entered his bed-room and shot him dead. Thereafter, the accused surrendered himself to the police. He was put under arrest and in due course he was committed to the sessions for facing a charge under Section 302 of the Indian Penal Code.

5. The defence version, as disclosed in the statement made by the accused before the Sessions Court under Section 342 of the Code of Criminal Procedure and his deposition in the said Court, may be briefly stated: The accused was away with his ship from April 6, 1959, to April 18, 1959. Immediately after returning to Bombay, he and his wife went to Ahmednagar for about three days in the company of his younger brother and his wife. Thereafter, they returned to Bombay and after a few days his brother and his wife left them. After they had left, the accused noticed that his wife was behaving strangely and was not responsive or affectionate to him. When questioned, she used to evade the issue. At noon on April 27, 1959, when they were sitting in the sitting-room for the lunch to be served, the accused put his arm round his wife affectionately, when she seemed to go tense and unresponsive. After lunch, when he questioned her about her fidelity, she shook her head to indicate that she was unfaithful to him. He guessed that her paramour was Ahuja. As she did not even indicate clearly whether Ahuja would marry her and look after the children, he decided to settle the matter with him. Sylvia pleaded with him not to go to Ahuja's house as he might shoot him. Thereafter, he drove his wife, two of his children and a neighbour's child in his car to a cinema, dropped them there and promised to come and pick them up at 6 p.m. when the show ended. He then drove to his ship, as he wanted to get medicine for his sick dog; he represented to the authorities in the ship that he wanted to draw a revolver and six rounds from the stores of the ship as he was going to drive alone to Ahmednagar by night, though the real purpose was to shoot himself. On receiving the revolver and six cartridges he put it inside a brown envelope. Then he drove his car to Ahuja's office, and not finding him there, he drove to Ahuja's flat, rang the door bell, and when it was opened by a servant, walked to Ahuja's bed-room, went into the bed-room and shut the door behind him. He also carried with him the envelope containing the revolver. The accused saw the deceased inside the bed-room, called him a filthy swine and asked him whether he would marry Sylvia and look after the children. The deceased retorted, "Am I to marry every woman I sleep with?" The accused became enraged, put the envelope containing the revolver on a cabinet nearby, and threatened to thrash the deceased. The deceased made a sudden move to grasp at the envelope, when the accused whipped out his revolver and told him to get back. A struggle ensued between the two and during that the struggle two shots went off accidentally and hit Ahuja resulting in his death. After the shooting the accused went back to his car and drove it to the police station where he surrendered himself. This is broadly, omitting the details, the case of the defence.

6. It would be convenient to dispose of at the outset the questions of law raised in this case.

7. Mr. G. S. Pathak, learned counsel for the accused raised before us the following points:

(*1*) Under Section 307 of the Code of Criminal Procedure, the High Court should decide whether a reference made by a Sessions Judge was competent only on a perusal of the order of reference made to it and it had no jurisdiction to consider the evidence and come to a conclusion

whether the reference was competent or not. (*2*) Under Section 307(3) of the said Code, the High Court had no power to set aside the verdict of a jury on the ground that there were misdirections in the charge made by the Sessions Judge. (*3*) There were no misdirections at all in the charge made by the Sessions Judge; and indeed his charge was fair to the prosecution as well as to the accused. (*4*) The verdict of the jury was not perverse and it was such that a reasonable body of persons could arrive at it on the evidence placed before them. (*5*) In any view, the accused shot at the deceased under grave and sudden provocation, and therefore even if he had committed an offence, it would not be murder but only culpable homicide not amounting to murder.

8. From the consideration of the entire evidence, the following facts emerge: The deceased seduced the wife of the accused. She had confessed to him of her illicit intimacy with the deceased. It was natural that the accused was enraged at the conduct of the deceased and had, therefore, sufficient motive to do away with the deceased. He deliberately secured the revolver on a false pretext from the ship, drove to the flat of Ahuja, entered his bed-room unceremoniously with a loaded revolver in hand and in about a few seconds thereafter came out with the revolver in his hand. The deceased was found dead in his bath-room with bullet injuries on his body. It is not disputed that the bullets that caused injuries to Ahuja emanated from the revolver that was in the hand of the accused. After the shooting, till his trial in the Sessions Court, he did not tell anybody that he shot the deceased by accident. Indeed, he confessed his guilt to the chowkidar Puran Singh and practically admitted the same to his college Samuel. His description of the struggle in the bath-room is highly artificial and is devoid of all necessary particulars. The injuries found on the body of the deceased are consistent with the intentional shooting and the main injuries are wholly inconsistent with accidental shooting when the victim and the assailant were in close grips. The other circumstances brought out in the evidence also establish that there could not have been any fight or struggle between the accused and the deceased.

9. We, therefore, unhesitatingly hold, agreeing with the High Court, that the prosecution has proved beyond any reasonable doubt that the accused has intentionally shot the deceased and killed him.

10. In this view it is not necessary to consider the question whether the accused had discharged the burden laid on him under Section 80 of the Indian Penal Code, especially as learned counsel appearing for the accused here and in the High Court did not rely upon the defence based upon that section.

11. That apart we agree with the High Court that on the evidence adduced in this case, no reasonable body of persons could have come to the conclusion which the jury reached in this case. For that reason also the verdict of the jury cannot stand.

12. Even so it is contended by Mr. Pathak that the accused shot the deceased while deprived of the power of self-control by sudden and grave provocation and, therefore, the offence would fall under Exception 1 to Section 300 of the Indian Penal Code. The said Exception reads:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with: (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

13. The first question raised is whether Ahuja gave provocation to Nanavati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.

14. Learned Attorney-General argues that though a confession of adultery by a wife may in certain circumstances be provocation by the paramour himself, under different circumstances it has to be considered from the standpoint of the person who conveys it rather than from the standpoint of the person who gives it. He further contends that even if the provocation was deemed to have been given by Ahuja, and though the said provocation might have been grave, it could not be sudden, for the provocation given by Ahuja was only in the past.

15. On the other hand, Mr. Pathak contends that the act of Ahuja, namely, the seduction of Sylvia, gave provocation though the fact of seduction was communicated to the accused by Sylvia and that for the ascertainment of the suddenness of the provocation it is not the mind of the person who provokes that matters but that of the person provoked that is decisive. It is not necessary to express our opinion on the said question, for we are satisfied that, for other reasons, the case is not covered by Exception 1 to Section 300 of the Indian Penal Code.

16. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In ***Mancini* v. *Director of Public Prosecutions*** [1942 AC 1, 9], Viscount Simon, L.C., states the scope of the doctrine of provocation thus:

> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death….The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in ***Rex* v. *Lesbini***[1914-3 KB 1116] so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Viscount Simon again in 1946 AC 588 at p. 598 elaborates further on this theme. There, the appellant had entertained some suspicions of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it

will ease your mind, I have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't-at Mrs. X's". With this the appellant lost temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to ***Mancini*** case [1942 AC 1 at p. 9] proceeded to state thus:

> The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.

Goddard, C.J. in ***R.*** **v.*Duffy*** [(1949)1 All ER 932] defines provocation thus:

> Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind….What matters is whether this girl (the accused) had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shall not kill'. That is what matters. Similarly, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden, temporary loss of self-control which is of the essence of provocation. Provocation being…as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is, whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind….Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation- that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given.

A passage from the address of Baron Parke to the jury in ***R.*** **v.** ***Thomas*** [(1837) 7 C & P. 817] extracted in **Russell on** ***Crime***, 11th ed., Vol. I at p. 593, may usefully be quoted:

> The passage extracted above lay down the following principles: (1) Except in circumstances of most extreme and exceptional character, a mere confession of adultery is not enough to reduce the offence of murder to manslaughter. (2) The act of provocation which reduced the offence of murder to manslaughter must be such as to cause a sudden and temporary loss of self-control; and it must be distinguished from a provocation which inspires an actual intention to kill. (3) The act should have been done during the continuance of that state of mind, that is, before there was time for

passion to cool and for reason to regain dominion over the mind. (4) The fatal blow should be clearly traced to the influence of passion arising from the provocation.

17. On the other hand, in India, the first principle has never been followed. That principle has had its origin in the English doctrine that mere words and gestures would not be in point of law sufficient to reduce murder to manslaughter. But the authors of the Indian Penal Code did not accept the distinction. They observed:

> It is an indisputable fact, that gross insults by words or gestures have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart.

Indian courts have not maintained the distinction between words and acts in the application of the doctrine of provocation in a given case. The Indian law on the subject may be considered from two aspects, namely, (1) whether words or gestures unaccompanied by acts can amount to provocation, and (2) what is the effect of the time lag between the act of provocation and the commission of the offence. In ***Empress* v. *Khogayi*** [ILR 2 Mad 122, 123], a division bench of the Madras High Court held, in the circumstances of that case, that abusive language used would be a provocation sufficient to deprive the accused of self-control. The learned Judges observed:

> What is required is that it should be of a character to deprive to offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind and was addressed to a man already enraged by the conduct of deceased's son.

It will be seen in this case that abusive language of the foulest kind was held to be sufficient in the case of a man who was already enraged by the conduct of the deceased's son. The same learned Judge in a later decision in ***Boya Munigadu* v. *The Queen*** [ILR 3 Mad 33,. 34-35] upheld the plea of grave and sudden provocation in the following circumstances: The accused saw the deceased when she had cohabitation with his bitter enemy; that night he had no meals; next morning he went to the ryots to get his wages from them and at that time he saw his wife eating food along with her paramour, he killed the paramour with a bill-hook. The learned judges held that the accused had sufficient provocation to bring the case within the first exception to Section 300 of the Indian Penal Code. The learned Judges observed:

> If having witnessed the act of adultery, he connected this subsequent conduct, as he could not fail to connect it, with that act, it would be conduct of a character highly exasperating to him, implying as it must, that all concealment of their criminal relations and all regard for his feelings were abandoned and that they proposed continuing their course of misconduct in his house. This, we think, amounted to provocation, grave enough and sudden enough to deprive him of his self control, and reduced the offence from murder to culpable homicide not amounting to murder.

The case illustrates that the state of mind of the accused, having regard to the earlier conduct of the deceased, may be taken into consideration in considering whether the subsequent act

would be a sufficient provocation to bring the case within the exception. Another division bench of the Madras High Court in ***re Murugian*** [AIR 1957 Mad 541] held that, where the deceased not only committed adultery but later on swore openly in the face of the husband that she would persist in such adultery and also abused the husband for remonstrating against such conduct, the case was covered by the first exception to Section 300 of the Indian Penal Code. The judgment of the Andhra Pradesh High Court in ***re C. Narayan*** [AIR 1958 A.P. 235], adopted the same reasoning in a case where the accused, a young man, who had a lurking suspicion of the conduct of his wife, who newly joined him, was confronted with the confession of illicit intimacy with, and consequent pregnancy by, another strangled his wife to death, and held that the case was covered by Exception 1 to Section 300 of the Indian Penal Code. These two decisions indicate that the mental state created by an earlier act may be taken into consideration in ascertaining whether a subsequent act was sufficient to make the assailant to lose his self-control.

18. Where the deceased led an immoral life and her husband, the accused, upbraided her and the deceased instead of being repentant said that she would again do such acts, and the accused, being enraged, struck her and, when she struggled and beat him, killed her, the Court held that the immediate provocation coming on top of all that had gone before was sufficient to bring the case within the first exception to Section 300 of the Indian Penal Code. So too, where a woman was leading a notoriously immoral life, and on the previous night mysteriously disappeared from the bedside of her husband and the husband protested against her conduct she vulgarly abused him, whereupon the husband lost his self-control, picked up a rough stick, which happened to be close by and struck her resulting in her death, the Lahore High Court, in ***Jan Muhammad*** **v.** ***Emperor*** [AIR 1929 Lah 861, 862-863] held that the case was governed by the said exception. The following observations of the court were relied upon in the present case:

> In the present case my view is that, in judging the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal, was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman.... As stated above, the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.

A division bench of the Allahabad High Court in ***Emperor*** **v.** ***Balku*** [AIR 1938 All 532, 533-534] invoked the exception in a case where the accused and the deceased, who was his wife's sister's husband, were sleeping on the same cot, and in the night the accused saw the deceased getting up from the cot and going to another room and having sexual intercourse with his (accused's) wife, and the accused allowed the deceased to return to the cot, but after the deceased fell asleep, he stabbed him to death. The learned Judges held:

> When Budhu (the deceased) came into intimate contact with the accused by lying beside him on the charpai this must have worked further on the mind of the accused and he must have reflected that 'this man now lying beside me had been dishonouring

me a few minutes ago'. Under these circumstances we think that the provocation would be both grave and sudden.

The Allahabad High Court in a recent decision, *viz*., ***Babu Lal* v. *State*** [AIR 1960 All. 233, 226] applied the exception to a case where the husband who saw his wife in a compromising position with the deceased killed the latter subsequently when the deceased came, in his absence, to his house in another village to which he had moved. The learned Judges observed:

> The appellant when he came to reside in the Government House Orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was absent. This could certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any less sudden.

All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery of the wife's infidelity and the subsequent act of her operated as a grave and sudden provocation on his disturbed mind.

19. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

20. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

21. Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self-control. But, if his version is true-for the

purpose of this argument we shall accept that what he has said is true-it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self-control, but, on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bed-room of Ahuja and shot him dead. Between 1.30 p.m., when he left his house, and 4.20 p.m.,when the murder took place, three hours had elapsed, and therefore there was sufficient time for him to regain his self-control, even if he had not regained it earlier. On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. Even if any conversation took place between the accused and the deceased in the manner described by the accused-though we do not believe that-it does not affect the question, for the accused entered the bed-room of the deceased to shoot him. The mere fact that before the shooting the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder. We, therefore, hold that the facts of the case do not attract the provisions of Exception 1 to Section 300 of the Indian Penal Code.

22. In the result, the conviction of the accused under Section 302 of the Indian Penal Code and sentence of imprisonment for life passed on him by the High Court are correct and there are absolutely no grounds for interference. The appeal stands dismissed.

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Ghapoo Yadav v. *State of M.P.*

(2003) 3 SCC 528

ARIJIT PASAYAT, J. - Appellants (hereinafter referred to as 'the accused' by their respective names) question legality of the judgment of the Madhya Pradesh High Court dated 18.4.2001, upholding their conviction for offences punishable under Sections 148 and 302 read with Section 149 of the Indian Penal Code, 1860 ('the IPC') and the sentence of rigorous imprisonment for three years and fine of Rs. 2,000/- with default stipulation, and imprisonment for life and fine of Rs. 5,000/- with default stipulation respectively.

2. Lekhram (PW-2) and Gopal ('the deceased') were sons of Ramlal (PW-1). Accused Gapoo Yadav is the father of accused Janku, Kewal and Mangal Singh. Accused Sunder is the nephew of accused Gapoo. Deceased, the witnesses and the accused belonged to the same village and there was land dispute between them. On the request made by Ramlal (PW-1), measurement of the land was done by the revenue authority. On the basis of the said measurement, it was found that land belonging to accused Mangal Singh was in the possession of Ramlal (PW-1) and over the said land a berry tree existed. Though, initially the tree was in possession of Ramlal, after measurement he parted with the possession thereof. The said tree was cut by the family members of Ramlal (PW-1) a day prior to the incident for which the deceased had altercation with the accused persons. On the date of the incident i.e. 9.6.1986 there were altercations between the accused persons and the deceased, his brother Lekhram and father Ramlal. Accused Janku enquired from the deceased as to why they were cutting the tree. Lekhram responded that it was cut three days prior to the incident as the tree belonged to them and was planted by their family members. The deceased claimed that he had not cut the tree. This led to altercations and scuffles amongst them and the accused persons assaulted the deceased, which resulted in a fracture of his leg. When Ramlal and Lekhram went to save him, the accused persons ran towards them threateningly. Ramlal and Lekhram fled away from the place of the incident, and returned later on with the other villagers. They took the deceased, who was then grasping for breath, on a cot to Maharajpur Police Station. Information was given by the deceased to the police at 8.45 p.m. He was sent for treatment and was examined by Dr. R.K. Chaturvedi (PW-3). On examination he found 7 injuries on his body. His dying declaration was recorded. Later on, the deceased took his last breath on 10.6.1986 at 2.00 a.m. Dr. Chaturvedi sent the intimation of death to the Police Station. Though initially a case was registered under Section 307 IPC, the same was converted to one under Section 302 IPC. Port mortem was conducted by Dr. D.N. Adhikari (PW-6). Investigation was undertaken and on completion thereof charge sheet was filed indicating alleged commission of offences punishable under Sections 147, 148 and 302 read with Section 149 IPC. The case was committed to the Court of Sessions, and finally charges were framed under Sections 148 and 302 read with Section 149 IPC. The accused persons pleaded innocence and claimed false implication.

3. On consideration of the evidence on record, the trial court found that the accused persons were guilty and accordingly convicted and sentenced them as aforenoted. It is to be noted that apart from the evidence of the two eyewitnesses, reliance was also placed on the dying declaration (Ex.P-1) recorded by Dr. Chaturvedi (PW-3). In appeal, the conviction and

consequential sentences imposed were upheld. Though, in support of the appeal learned counsel for the appellants attacked the findings recorded, ultimately he confined his arguments to the question relating to nature of the offence. He further conceded that if the factual findings as recorded are affirmed then Sections 148 and 149 would have application. In our view, the approach is well founded because the trial court and the High Court having analysed the evidence in detail, concluded that the accused persons were culprits.

4. It was the stand of the learned counsel for the appellants that the injuries sustained by the deceased were in course of a sudden quarrel, without pre-meditation and without cruel intents and, therefore, Section 302 IPC was not applicable. According to him, Section 302 IPC cannot be applied even if the prosecution case is accepted *in toto* and Exception 4 to Section 300 is clearly applicable.

5. In response, learned counsel appearing for the State of Madhya Pradesh submitted that it is a case to which Section 302 has clear application, and the courts below have rightly applied it along with Sections 148 and 149 IPC.

6. The question is about applicability of Exception 4 to Section 300, IPC. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

7. The fourth Exception to Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1, there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them, in respect of guilt, upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side.

8. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the ‘fight’ occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a

fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. In the case at hand, out of the seven injuries, only injury no.2 was held to be of grievous nature, which was sufficient in the ordinary course of nature to cause death of the deceased. The infliction of the injuries and their nature proves the intention of the accused appellants, but causing of such injuries cannot be termed to be either in a cruel or unusual manner for not availing the benefit of Exception 4 to Section 300 IPC. After the injuries were inflicted the injured had fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused appellants had come prepared and armed for attacking the deceased. The previous disputes over land do not appear to have assumed characteristics of physical combat. This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in a cruel or unusual manner. That being so, Exception 4 to Section 300 IPC is clearly applicable. The fact situation bears great similarity to that in ***Sukhbir Singh*** **v.** ***State of Haryana*** [(2002)3 SCC 327]. Appellants are to be convicted under Section 304 Part I, IPC and custodial sentence of 10 years and fine as was imposed by the trial court would meet the ends of justice. The appeal is allowed to the extent indicated above.

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Tehseen S. Poonawalla vs Union of India
(2018) 9 SCC 501

Dipak Misra, CJI:

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4. The petitioner, a social activist, has preferred this writ petition under Article 32 of the Constitution for commanding the respondent-State Nos. 3 to 8 to take immediate and necessary action against the cow protection groups indulging in violence; and further to issue a writ or direction to remove the violent contents from the social media uploaded and hosted by the said groups. There is also a prayer to declare Section 12 of the Gujarat Animal Prevention Act, 1954, Section 13 of the Maharashtra Animal Prevention Act, 1976 and Section 15 of the Karnataka Prevention of Cow Slaughter and Cattle Preservation Act, 1964 as unconstitutional. Certain incidents have also been narrated in the Writ Petition.

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15. At the very inception, while delving into the rivalised submissions advanced at the Bar, it is necessary to understand that a controversy of the present nature deserves to be addressed with enormous sensitivity. We had issued certain directions as an interim measure and there has been some compliance but we are of the considered opinion that the situations that have emerged and the problems that have arisen need to be totally curbed. The States have the onerous duty to see that no individual or any core group take law into their own hands. Every citizen has the right to intimate the police about the infraction of law. As stated earlier, an accused booked for an offence is entitled to fair and speedy trial under the constitutional and statutory scheme and, thereafter, he may be convicted or acquitted as per the adjudication by the judiciary on the basis of the evidence brought on record and the application of legal principles. There cannot be an investigation, trial and punishment of any nature on the streets. The process of adjudication takes place within the hallowed precincts of the courts of justice and not on the streets. No one has the right to become the guardian of law claiming that he has to protect the law by any means. It is the duty of the States, as has been stated in Nandini Sundar and others v. State of Chhattisgarh, to strive, incessantly and consistently, to promote fraternity amongst all citizens so that the dignity of every citizen is protected, nourished and promoted. That apart, it is the responsibility of the States to prevent untoward incidents and to prevent crime.

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17. There can be no shadow of doubt that the authorities which are conferred with the responsibility to maintain law and order in the States have the principal obligation to see that vigilantism, be it cow vigilantism or any other vigilantism of any perception, does not take place. When any core group with some kind of idea take the law into their hands, it ushers in anarchy, chaos, disorder and, eventually, there is an emergence of a violent society. Vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion. We may note here that certain applications for intervention and written notes have been

filed in this regard supporting the same on the basis that there is cattle smuggling and cruel treatment to animals. In this context, suffice it to say that it is the law enforcing agencies which have to survey, prevent and prosecute. No one has the authority to enter into the said field and harbour the feeling that he is the law and the punisher himself. A country where the rule of law prevails does not allow any such thought. It, in fact, commands for ostracisation of such thoughts with immediacy.

18. Lynching is an affront to the rule of law and to the exalted values of the Constitution itself. We may say without any fear of contradiction that lynching by unruly mobs and barbaric violence arising out of incitement and instigation cannot be allowed to become the order of the day. Such vigilantism, be it for whatever purpose or borne out of whatever cause, has the effect of undermining the legal and formal institutions of the State and altering the constitutional order. These extrajudicial attempts under the guise of protection of the law have to be nipped in the bud; lest it would lead to rise of anarchy and lawlessness which would plague and corrode the nation like an epidemic. The tumultuous dark clouds of vigilantism have the effect of shrouding the glorious ways of democracy and justice leading to tragic breakdown of the law and transgressing all forms of civility and humanity. Unless these incidents are controlled, the day is not far when such monstrosity in the name of self-professed morality is likely to assume the shape of a huge cataclysm. It is in direct violation of the quintessential spirit of the rule of law and of the exalted faiths of tolerance and humanity.

19. Mob vigilantism and mob violence have to be prevented by the governments by taking strict action and by the vigil society who ought to report such incidents to the state machinery and the police instead of taking the law into their own hands. Rising intolerance and growing polarisation expressed through spate of incidents of mob violence cannot be permitted to become the normal way of life or the normal state of law and order in the country. Good governance and nation building require sustenance of law and order which is intricately linked to the preservation of the marrows of our social structure. In such a situation, the State has a sacrosanct duty to protect its citizens from unruly elements and perpetrators of orchestrated lynching and vigilantism with utmost sincerity and true commitment to address and curb such incidents which must reflect in its actions and schemes.

20. Hate crimes as a product of intolerance, ideological dominance and prejudice ought not to be tolerated; lest it results in a reign of terror. Extra judicial elements and non-State actors cannot be allowed to take the place of law or the law enforcing agency. A fabricated identity with bigoted approach sans acceptance of plurality and diversity results in provocative sentiments and display of reactionary retributive attitude transforming itself into dehumanisation of human beings. Such an atmosphere is one in which rational debate, logical discussion and sound administration of law eludes thereby manifesting clear danger to various freedoms including freedom of speech and expression. One man's freedom of thought, action, speech, expression, belief, conscience and personal choices is not being tolerated by the other

and this is due to lack of objective rationalisation of acts and situations. In this regard, it has been aptly said:-

"Freedom of speech is a principal pillar of a free government; When this support is taken away, the constitution of a free society is dissolved and tyranny is erected on its ruins."

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22. In S. Rangarajan v. P. Jagjivan Ram and others, K. Jagannatha Shetty, J., although in a different context, referred to the decision of the European Court of Human Rights in Handyside v. United Kingdom wherein it has been held thus in the context of Article 10 of the European Convention on Human Rights (ECHR):-

"The court‟s supervisory functions oblige it to pay the utmost attention to the principles EHRR 737, at p. 754 characterizing a democratic society‟. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."

23. In a rights based approach to constitutional legitimacy, the right to life and liberty is considered paramount and, therefore, democratic governments must propel and drive towards stronger foothold for liberties so as to ensure sustenance of higher values of democracy thereby paving the path for a spontaneous constitutional order. Crime knows no religion and neither the perpetrator nor the victim can be viewed through the lens of race, caste, class or religion. The State has a positive obligation to protect the fundamental rights and freedoms of all individuals irrespective of race, caste, class or religion. The State has the primary responsibility to foster a secular, pluralistic and multi- culturalistic social order so as to allow free play of ideas and beliefs and co-existence of mutually contradictory perspectives. Stifling free voices can never bode well for a true democracy. It is essential to build societies which embrace diversity in all spheres and rebuild trust of the citizenry in the State machinery.

24. Lynching and mob violence are creeping threats that may gradually take the shape of a Typhon-like monster as evidenced in the wake of the rising wave of incidents of recurring patterns by frenzied mobs across the country instigated by intolerance and misinformed by circulation of fake news and false stories. There has been an unfortunate litany of spiralling mob violence and agonized horror presenting a grim and gruesome picture that compels us to reflect whether the populace of a great Republic like ours has lost the values of tolerance to sustain a diverse culture. Besides, bystander apathy, numbness of the mute spectators of the scene of the crime, inertia of the law enforcing machinery to prevent such crimes and nip them in the bud and grandstanding of the incident by the perpetrators of the crimes including in the

social media aggravates the entire problem. One must constantly remind oneself that an attitude of morbid intolerance is absolutely intolerable and agonizingly painful.

25. Lynching, at one point of time, was so rampant in the United States that Mark Twain had observed in his inimitable style that it had become "the United States of Lyncherdom". The sarcasm is apparent.

26. In the obtaining situation, the need to preserve and maintain unity amongst the fellow citizens of our country, who represent different castes, creed and races, follow different religions and use multiple languages, ought to be discussed and accentuated. It is requisite to state that our country must sustain, exalt and celebrate the feeling of solidarity and harmony so that the spirit of oneness is entrenched in the collective character. Sans such harmony and understanding, we may unwittingly pave the path of disaster.

27. In St. Stephen's College v. University of Delhi, while emphasizing on the significance of "Unity in Diversity", the Court has observed that the aim of our Constitution is unity in diversity and to impede any fissiparous tendencies for enriching the unity amongst Indians by assimilating the diversities. The meaning of diversity in its connotative expanse of the term would include geographical, religious, linguistic, racial and cultural differences. It is absolutely necessary to underscore that India represents a social, religious and cultural diversity.

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29. The Court in Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and others v. State of U.P. and others has highlighted that religious tolerance is an important facet of "Unity in Diversity" and observed thus:-

"Unity in diversity is the Indian culture and ethos. The tolerance of all religious faiths, respect for each other's religion are our ethos. These pave the way and foundation for integration and national unity and foster respect for each others religion; religious faith and belief. Integration of Bharat is, thus, its arch."

30. In State of Karnataka and another v. Dr. Praveen Bhai Thogadia, stress has been laid on "Unity in Diversity" treating it as the ideal way of life considering that our nation is a unification of people coming from diverse cultures, religions and races. The Court further went on to say that our nation has the world's most heterogeneous society having a rich heritage where the Constitution is committed to the high ideas of socialism, secularism and the integrity of the nation and problems, if any, that arise on the path of the nation's progress are mostly solved on the basis of human approaches and harmonious reconciliation of differences. The following observations made by the Court in the aforesaid case with regard to the need to preserve the unified social fabric are also important:-

"It is, therefore, imperative that if any individual or group of persons, by their action or caustic and inflammatory speech are bent upon sowing seed of mutual hatred, and their proposed activities are likely to create disharmony and disturb equilibrium, sacrificing public peace and tranquility, strong action, and more so preventive actions are essentially and vitally needed to

be taken. Any speech or action which would result in ostracization of communal harmony would destroy all those high values which the Constitution aims at. Welfare of the people is the ultimate goal of all laws, and State action and above all the Constitution. They have one common object, that is to promote well being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names. It is inconceivable that there can be social well being without communal harmony, love for each other and hatred for none."

31. Unity in Diversity must be recognized as the most potent weapon in India's armoury which binds different and varied kinds of people in the solemn thread of humanity. This diversity is the strength of our nation and for realizing this strength, it is sine qua non that we sustain it and shun schismatic tendencies. It has to be remembered that the unique feature of "Unity in Diversity" inculcates in the citizens the virtue of respecting the opinions and choices of others. Such respect imbibes the feeling of acceptance of plurality and elevates the idea of tolerance by promoting social cohesion and infusing a sense of fraternity and comity.

32. In this context, the observations in State of Uttar Pradesh v. Lalai Singh Yadav are apt:-

"The State, in India, is secular and does not take sides with one religion or other prevalent in our pluralistic society. It has no direct concern with the faiths of the people but is deeply obligated not merely to preserve and protect society against breaches of the peace and violations of public order but also to create conditions where the sentiments and feelings of people of diverse or opposing beliefs and bigotries are not so molested by ribald writings or offence publications as to provoke or outrage groups into possible violent action. Essentially, good government necessitates peace and security." Thus, for our nation to survive, without being whittled down, it is a necessary precondition that all must embrace the sentiment that they are the essential constituents of diversity that galvanizes for preservation of unity and respects pluralistic perceptions in cohesion with the constitutional ethos.

33. Having stated about the need of tolerance in a pluralistic society, we may refer with profit that the Court in D.K. Basu v. State of West Bengal, after referring to the authorities in Joginder Kumar v. State of U.P. and others, Nilabati Behera v. State of Orissa and others and State of M.P. v. Shyamsunder Trivedi and others, laid down certain guidelines to be followed in cases of arrest and detention. In Arnesh Kumar v. State of Bihar and another, this Court referred to Section 41-A of the Code of Criminal Procedure and ruled thus:-

"7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is

necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC."

34. The purpose of referring to the said authorities is that the law provides a procedure for arrest and equally for investigation and the consequential trial. That is what has been interpreted by this Court while dealing with Article 21 of the Constitution.

Thus, the rights of the citizens cannot be destroyed in an unlawful manner. As the investigating agency has to show fidelity to the statutory safeguards, similarly, every citizen is required to express loyalty to law and the legal procedure. No one, and we repeat no one, is entitled to take the law into his own hands and annihilate anything that the majesty of law protects. When the vigilantes involve themselves in lynching or any kind of brutality, they, in fact, put the requisite accountability of a citizen to law on the ventilator. That cannot be countenanced. Such core groups cannot be allowed to act as they please. They cannot be permitted to indulge in freezing the peace of life on the basis of their contrived notions. They are no one to punish a person by ascribing any justification. The stand and stance put forth in the interlocutory applications filed by the impleaded parties intend to convey certain contraventions of the provisions of statutory law but the prescription of punishment does not empower any one to authorize himself to behave as the protector of law and impose punishment as per his choice and fancy. That is the role and duty of the law enforcing agencies known to law. No one else can be permitted to expropriate that role. It has to be clearly understood that self-styled vigilantes have no role in that sphere. Their only right is to inform the crime, if any, to the law enforcing agency. It is the duty of the law enforcement agencies and the prosecutors to bring the accused persons before the law adjudicating authorities who, with their innate training and sense of justice, peruse the materials brought on record, follow the provisions of law and pass the judgment. In the scheme of things, the external forces cannot assume the role of protectors and once they pave the said path, they associate themselves with criminality and bring themselves in the category of criminals. It is imperative for them to remember that they are subservient to the law and cannot be guided by notions or emotions or sentiments or, for that matter, faith.

35. In this context, we may reproduce a passage from Shakti Vahini (supra) which, though pronounced in a different context, has certain significance:-

"The 'Khap Panchayats' or such assembly should not take the law into their hands and further cannot assume the character of the law implementing agency, for that authority has not been conferred upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under Indian Penal Code is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge an FIR or inform the police. They may also facilitate so that the Accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to

stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance."

36. We may now refer to some of the authorities of the American Courts which have dealt with the menace of lynching which, at one point of time, was very rampant in the American society. The American Courts deplored this menace and dealt it with iron hands so as to eradicate the same. Ex parte Riggins was a case involving the lynching of a Negro citizen who had been imprisoned on the charge of murder. While he was imprisoned in jail, the mob removed him and lynched him by hanging. Thereafter, certain mobsters involved in the said hanging were indicted. A petition of habeas corpus was filed seeking the release of the said mobsters on the ground that there was no law in the United States which legalized the indictment of the said mobsters. While disposing of the said habeas corpus petition and upholding the indictment, Thomas Goode Jones, J. made the following relevant observations:-

"When a private individual takes a person charged with crime from the custody of the state authorities to prevent the state from affording him due process of law, and puts him to death to punish the crime and to prevent the enjoyment of such right, it is violent usurpation and exercise, in the particular case, of the very function which the Constitution of the United States itself, under this clause [the 14th Amendment] directs the state to perform in the interest of the citizen. Such lawlessness differs from ordinary kidnapping and murder, in that dominant intent and actual result is usurpation and exercise by private individuals of the sovereign functions of administering justice and punishing crime, in order to defeat the performance of duties required of the state by the supreme law of the land. The inevitable effect of such lawlessness is not merely to prevent the state from performing its duty, but to deprive the accused of all enjoyment, or opportunity of enjoyment of rights which this clause of the Constitution intended to work out for him by the actual performance by the state of all things included in affording due process of law, which enjoyment can be worked out in no other way in his individual case. Such lawlessness defeats the performance of the state's duty, and the opportunity of the citizen to have the benefit of it, quite as effectually and far more frequently than vicious laws, or the partiality or the inefficiency of state officers in the discharge of their constitutional duty. It is a great, notorious, and growing evil, which directly attacks the purpose which the Constitution of the United States had in view when it enjoined the duty upon the state."

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38. Thus, the decisions of this Court as well as the authorities from other jurisdictions clearly show that every citizen has to abide by the law and the law never confers the power on a citizen to become the law unto himself or take law into his hands. The idea is absolutely despicable, the thought is utterly detestable and the action is obnoxious and completely hellish. It is nauseatingly perverse. In the aforesaid hearing, Mr. Hegde, as stated earlier, gave the preventive, remedial and punitive measures to be laid down as guidelines by this Court. Ms. Indira Jaising, learned senior counsel, has placed reliance on Pravasi Bhalai Sangathan v. Union

of India and others to submit that these guidelines do come under Sections 153 and 295A IPC and this Court has elaborately dealt with the same.

39. There is no dispute that the act of lynching is unlawful but we are not concerned with any specific case since it has become a sweeping phenomenon with a far-reaching impact. It is our constitutional duty to take a call to protect lives and human rights. There cannot be a right higher than the right to live with dignity and further to be treated with humanness that the law provides. What the law provides may be taken away by lawful means; that is the fundamental concept of law. No one is entitled to shake the said foundation. No citizen can assault the human dignity of another, for such an action would comatose the majesty of law. In a civilized society, it is the fear of law that prevents crimes. Commencing from the legal space of democratic Athens till the legal system of modern societies today, the law makers try to prevent crimes and make the people aware of the same but some persons who develop masterly skill to transgress the law jostle in the streets that eventually leads to an atmosphere which witnesses bloodshed and tears. When the preventive measures face failure, the crime takes place and then there have to be remedial and punitive measures. Steps to be taken at every stage for implementation of law are extremely important. Hence, the guidelines are necessary to be prescribed.

40. In view of the aforesaid, we proceed to issue the following guidelines:-

A. Preventive Measures

(i) The State Governments shall designate, a senior police officer, not below the rank of Superintendent of Police, as Nodal Officer in each district. Such Nodal Officer shall be assisted by one of the DSP rank officers in the district for taking measures to prevent incidents of mob violence and lynching. They shall constitute a special task force so as to procure intelligence reports about the people who are likely to commit such crimes or who are involved in spreading hate speeches, provocative statements and fake news.

(ii) The State Governments shall forthwith identify Districts, Sub-Divisions and/or Villages where instances of lynching and mob violence have been reported in the recent past, say, in the last five years. The process of identification should be done within a period of three weeks from the date of this judgment, as such time period is sufficient to get the task done in today's fast world of data collection.

(iii) The Secretary, Home Department of the concerned States shall issue directives/advisories to the Nodal Officers of the concerned districts for ensuring that the Officer In-charge of the Police Stations of the identified areas are extra cautious if any instance of mob violence within their jurisdiction comes to their notice.

(iv) The Nodal Officer, so designated, shall hold regular meetings (at least once a month) with the local intelligence units in the district along with all Station House Officers of the district so as to identify the existence of the tendencies of vigilantism, mob violence or lynching in the district and take steps to prohibit instances of dissemination of offensive material through

different social media platforms or any other means for inciting such tendencies. The Nodal Officer shall also make efforts to eradicate hostile environment against any community or caste which is targeted in such incidents.

(v) The Director General of Police/the Secretary, Home Department of the concerned States shall take regular review meetings (at least once a quarter) with all the Nodal Officers and State Police Intelligence heads. The Nodal Officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues at the State level.

(vi) It shall be the duty of every police officer to cause a mob to disperse, by exercising his power under Section 129 of CrPC, which, in his opinion, has a tendency to cause violence or wreak the havoc of lynching in the disguise of vigilantism or otherwise.

(vii) The Home Department of the Government of India must take initiative and work in co-ordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of mob violence and lynching against any caste or community and to implement the constitutional goal of social justice and the Rule of Law.

(viii) The Director General of Police shall issue a circular to the Superintendents of Police with regard to police patrolling in the sensitive areas keeping in view the incidents of the past and the intelligence obtained by the office of the Director General. It singularly means that there should be seriousness in patrolling so that the anti-social elements involved in such crimes are discouraged and remain within the boundaries of law thus fearing to even think of taking the law into their own hands.

(ix) The Central and the State Governments should broadcast on radio and television and other media platforms including the official websites of the Home Department and Police of the States that lynching and mob violence of any kind shall invite serious consequence under the law.

(x) It shall be the duty of the Central Government as well as the State Governments to take steps to curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence and lynching of any kind.

(xi) The police shall cause to register FIR under Section 153A of IPC and/or other relevant provisions of law against persons who disseminate irresponsible and explosive messages and videos having content which is likely to incite mob violence and lynching of any kind.

(xii) The Central Government shall also issue appropriate directions/advisories to the State Governments which would reflect the gravity and seriousness of the situation and the measures to be taken.

B. Remedial Measures

(i) Despite the preventive measures taken by the State Police, if it comes to the notice of the local police that an incident of lynching or mob violence has taken place, the jurisdictional police station shall immediately cause to lodge an FIR, without any undue delay, under the relevant provisions of IPC and/or other provisions of law.

(ii) It shall be the duty of the Station House Officer, in whose police station such FIR is registered, to forthwith intimate the Nodal Officer in the district who shall, in turn, ensure that there is no further harassment of the family members of the victim(s).

(iii) Investigation in such offences shall be personally monitored by the Nodal Officer who shall be duty bound to ensure that the investigation is carried out effectively and the charge-sheet in such cases is filed within the statutory period from the date of registration of the FIR or arrest of the accused, as the case may be.

(iv) The State Governments shall prepare a lynching/mob violence victim compensation scheme in the light of the provisions of Section 357A of CrPC within one month from the date of this judgment. In the said scheme for computation of compensation, the State Governments shall give due regard to the nature of bodily injury, psychological injury and loss of earnings including loss of opportunities of employment and education and expenses incurred on account of legal and medical expenses. The said compensation scheme must also have a provision for interim relief to be paid to the victim(s) or to the next of kin of the deceased within a period of thirty days of the incident of mob violence/lynching.

(v) The cases of lynching and mob violence shall be specifically tried by designated court/Fast Track Courts earmarked for that purpose in each district. Such courts shall hold trial of the case on a day to day basis. The trial shall preferably be concluded within six months from the date of taking cognizance. We may hasten to add that this direction shall apply to even pending cases. The District Judge shall assign those cases as far as possible to one jurisdictional court so as to ensure expeditious disposal thereof. It shall be the duty of the State Governments and the Nodal Officers in particular to see that the prosecuting agency strictly carries out its role in appropriate furtherance of the trial.

(vi) To set a stern example in cases of mob violence and lynching, upon conviction of the accused person(s), the trial court must ordinarily award maximum sentence as provided for various offences under the provisions of the IPC.

(vii) The courts trying the cases of mob violence and lynching may, on application by a witness or by the public prosecutor in relation to such witness or on its own motion, take such measures, as it deems fit, for protection and for concealing the identity and address of the witness.

(viii) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall be given timely notice of any court proceedings and he/she shall be entitled to be heard at the trial in respect of applications such as bail, discharge, release and parole filed by the accused persons. They shall also have the right to file written submissions on conviction, acquittal or sentencing.

(ix) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall receive free legal aid if he or she so chooses and engage any advocate of his/her choice from amongst those enrolled in the legal aid panel under the Legal Services Authorities Act, 1987.

C. Punitive Measures

(i) Wherever it is found that a police officer or an officer of the district administration has failed to comply with the aforesaid directions in order to prevent and/or investigate and/or facilitate expeditious trial of any crime of mob violence and lynching, the same shall be considered as an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her and not limited to departmental action under the service rules. The departmental action shall be taken to its logical conclusion preferably within six months by the authority of the first instance.

(ii) In terms of the ruling of this Court in Arumugam Servai v. State of Tamil Nadu, the States are directed to take disciplinary action against the concerned officials if it is found that (i) such official(s) did not prevent the incident, despite having prior knowledge of it, or (ii) where the incident has already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits.

41. The measures that are directed to be taken have to be carried out within four weeks by the Central and the State Governments. Reports of compliance be filed within the said period before the Registry of this Court.

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43. Apart from the directions we have given hereinbefore and what we have expressed, we think it appropriate to recommend to the legislature, that is, the Parliament, to create a separate offence for lynching and provide adequate punishment for the same. We have said so as a special law in this field would instill a sense of fear for law amongst the people who involve themselves in such kinds of activities. There can be no trace of doubt that fear of law and veneration for the command of law constitute the foundation of a civilized society.

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Cherubin Gregory v. *State of Bihar*

AIR 1964 SC 205: (1964) 4 SCR 199

N. RAJAGOPALA AYYANGAR, J. - This is an appeal by special leave against the judgment of the High Court of Patna dismissing an appeal by the appellant against his conviction and the sentence passed on him by the Sessions Judge, Champaran.

2. The appellant was charged with an offence under Section 304-A of the Indian Penal Code for causing the death of one Mst. Madilen by contact with an electrically charged naked copper wire which he had fixed up at the back of his house with a view to prevent the entry of intruders into his latrine. The deceased Madilen was an inmate of a house near that of the accused. The wall of the latrine of the house of the deceased had fallen down about a week prior to the day of the occurrence - July 16, 1959, with the result that her latrine had become exposed to public view. Consequently the deceased, among others, started using the latrine of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective and it was for this reason that on the facts, as found by the courts below, the accused wanted to make entry into his latrine dangerous to the intruders.

3. Though some of the facts alleged by the prosecution were disputed by the accused, they are now concluded by the findings of the courts below and are no longer open to challenge and, indeed learned counsel for the appellant did not attempt to controvert them. The facts, as found are that, in order to prevent the ingress of persons like the deceased into his latrine by making such ingress dangerous (1) the accused fixed up a copper wire across, the passage leading up his latrine, (2) that this wire was naked and uninsulated and carried current from the electrical wiring of his house to which it was connected (3) there was no warning that the wire was live, (4) the deceased managed to pass into the latrine without contacting the wire but that as she came out her hand happened to touch it and she got a shock as a result of which she died soon after. On these facts the Courts below held that the accused was guilty of an offence under Section 304-A of the Indian Penal Code.

The accused made a suggestion that the deceased had been sufficiently warned and the facts relied on in this connection were two: (1) that at the time of the accident it was past day break and there was therefore enough light, and (2) that an electric light was burning some distance away. But it is manifest that neither of these could constitute warning as the condition of the wire being charged with electric current could not obviously be detected merely by the place being properly lit.

4. The voltage of the current passing through the naked wire being high enough to be lethal, there could be no dispute that charging it with current of that voltage was a “rash act” done in reckless disregard of the serious consequences to people coming in contact with it.

5. It might be mentioned that the accused was also charged before the learned Sessions Judge with an offence under Section 304 of the Indian Penal Code but on the finding that the accused had no intention to cause the death of the deceased he was acquitted of that charge.

6. The principal point of law which appears to have been argued before the learned Judges of the High Court was that the accused had a right of private defence of property and that the

death was caused in the course of the exercise of that right. The learned Judges repelled this defence and, in our opinion quite correctly. The right of private defence of property which is set out in Section 97 of the Indian Penal Code is, as that section itself provides, subject to the provisions of Section 99, of the Code. It is obvious that the type of injury caused by the trap laid by the accused cannot be brought within the scope of Section 99, nor of course of Section 103 of the Code. As this defence was not pressed before us with any seriousness it is not necessary to deal with this at more length.

7. Learned counsel, however, tried to adopt a different approach. The contention was that the deceased was a trespasser and that there was no duty owed by an occupier like the accused towards the trespasser and therefore the latter would have had no cause of action for damages for the injury inflicted and that if the act of the accused was not a tort, it could not also be a crime. There is no substance in this line of argument. In the first place, where we have a Code like the Indian Penal Code which defines with particularity the ingredients of a crime and the defences open to an accused charged with any of the offences there set out we consider that it would not be proper or justifiable to permit the invocation of some Common Law principle outside that Code for the purpose of treating, what on the words of the statute is a crime, into a permissible or other than unlawful act. But that apart, learned counsel is also not right in his submission that the act of the accused as a result of which the deceased suffered injuries resulting in her death was not an actionable wrong. A trespasser is not an outlaw, a *caput lupinem*. The mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser. Thus, in England it has been held that one who sets spring-guns to shoot at trespassers is guilty of a tort and that the person injured is entitled to recover. The laying of such a trap, and there is little difference between the spring-gun which was the trap with which the English Courts had to deal and the naked live wire in the present case, is in truth “an arrangement to shoot a man without personally firing a shot”. It is, no doubt, true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. As we pointed out earlier, the voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property. The position as to the obligation of occupiers towards trespassers has been neatly summarised by the Law Reform Committee of the United Kingdom in the following words:

> The trespasser enters entirely at his own risk, but the occupier must not set traps designed to do him bodily harm or to do any act calculated to do bodily harm to the trespasser whom he knows to be or who to his knowledge is likely to be on his premises. For example, he must not set man-traps or spring-guns. This is no more than ordinary civilised behaviour.

Judged in the light of these tests, it is clear that the point urged is wholly without merit. The appeal fails and is dismissed.

S.N. Hussain v. *State of A.P.*

AIR 1972 SC 685

D.G. PALEKAR, J. - This is an appeal by special leave from the order of conviction and sentence passed by the High Court of Andhra Pradesh. The appellant, who was a bus driver, had been charged before the learned Munsif Magistrate, Alampur, for offences under Sections 304-A, 338 and 337, I.P.C., but was acquitted. The State Government appealed against the acquittal to the High Court and the High Court has convicted him under all these sections and sentenced him to suffer rigorous imprisonment for two years under Section 304-A, I.P.C. and made the other sentences to run concurrently with the same. Hence the present appeal.

2. The appellant was the driver of a R.T.C. bus, APZ 1672, and was driving the vehicle on January 1, 1966, from Kurnool to Vanaparthy. The bus left Kurnool at about 6.15 a. m. and reached the railway level crossing gate between Alampur Road Station and Manopad railway station at about 6.30 or 7.00 a. m. The level crossing is in charge of a gateman and it is the duty of the gateman to close the gate when a train is expected to pass by. It is an admitted fact that at the time when the appellant with his bus reached the level crossing the gate was open. The appellant passed through the gate and crossed the meter gauge track when suddenly a goods train dashed against the bus on the rear side with the result that the bus was thrown off causing serious injuries to the passengers. There were about 43 passengers in the bus. Out of these, one died on the spot, three died later in the hospital and about 21 other passengers received more or less severe injuries. The charge against the appellant was that he was rash or negligent in crossing the railway track when a goods train was about to pass the gate.

3. The appellant's defence was that he was neither rash nor negligent and the accident was unavoidable. He did not realize at all that a goods train was passing at the time and since the gate was open he crossed the railway crossing absolutely oblivious of the fact that a train was approaching. The learned Trial Magistrate accepted the defence but the High Court was pleased to hold that the appellant was both rash and negligent.

4. It is contended before us that the learned Magistrate had taken a very reasonable view of the case and, therefore, the High Court should not have interfered with the order of acquittal. It is also contended that the view of the High Court could not be sustained on the evidence which was so conclusively in favour of the appellant that the conviction was improper.

5. A large number of witnesses were examined to prove the case against the appellant but most of them turned hostile. The High Court, however, relied upon a few witnesses for its finding that the appellant was both rash and negligent, and it is contended before us that these witnesses had not really proved the charge against the appellant.

6. A few facts require to be noted at the outset:

(1) The bus was not driven and could not have been driven fast. The vehicle, before it reaches the level crossing, has to negotiate two bends on the road. The road is U-shaped. The base of this U-shape is formed by the level crossing and the two arms of this U lie on either side of the railway track. The approach from Kurnool is at one end of the right arm and to come to the level crossing a vehicle has to negotiate two bends - one near the approach and the other near the level crossing. After these bends are negotiated the road climbs up to the level crossing, the railway track being at a much higher level than the road. The situation, therefore, of the road and the level crossing would clearly go to show that no vehicle which is to negotiate two near bends and climb up a gradient can maintain high speed. As a matter of fact it is admitted by P. W. 13, S. Veerappa, who was the conductor of the bus, that at the time when the bus was entering the railway gate, it was going dead slow. This is also the evidence of P. W. 56, G. Laxaman Rao, Sub-Inspector of police who was travelling in the bus with his family. He was sitting in the front seat close to the driver and his evidence is important as we will show later.

(2) That the gate of the level crossing which is a manned gate, was open, indicating thereby that no train was expected to come at the time and inviting vehicles to pass.

(3) The railway track was at a higher level and the road was lined by babool trees and, therefore, a passing train coming from a distance was not visible from the bus.

(4) The bus was making a huge noise because it was not fitted with a silencer.

(5) As a cold breeze was blowing some of the window screens of the bus were lowered for the comfort of the passengers in the bus.

(6) There is no evidence that the train while approaching the level crossing gave any whistle or whistles. In any case there is no evidence that any whistle was heard by any of the occupants of the bus.

7. It is against this background we have to see whether the appellant was either rash or negligent. Rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. This definition of criminal rashness and criminal negligence given by Straight, J. in ***Empress* v. *Idu Beg*** [(1881) 3 All 776] has been adopted by this Court in ***Bhalchandra Waman Pathe* v. *State of Maharashtra***[1968 SCD 198].

8. The High Court has held that the appellant was guilty of criminal rashness because in its view the appellant "tried to negotiate the level crossing in a spirit of bravado and absolutely callous and unmindful of the consequences of the impending collision". For this finding the High Court has principally relied on the evidence of P.W. 12, Sayanna, his wife Kanthamma, P.W. 15 and their son Samuel, P.W. 16. All three of them were travelling in that bus. According to Sayanna, who is a railway gangman, when the bus was crossing the railway line a Goods train dashed against the bus. He further says that when the bus was outside the railway gate and just before it crossed the railway gate, he had shouted that the train had come. But by the time the conductor stood up to warn the driver the bus crossed the railway line and the goods train dashed against the bus. He further says that the other passengers also in the bus shouted. This evidence is supported by his wife Kanthamma, P.W. 15 and their son Samuel, P.W. 16. The conductor S. Veerappa, P.W. 13 does not, however, say that anybody had warned him about the approaching train or that he had got up from his seat to give the warning bell to the driver. The bus was 21 feet in length and the railway crossing was about 18 feet across and it will be difficult to say from the above evidence if the shouting had taken place in sufficient time to permit the driver to stop the bus before it reached the railway track. The train is much broader than its track and if a collision is to be avoided it can be done only by stopping the bus some feet away from the railway track. It is not improbable that the gangman Sayanna became conscious of the approaching train just when the gate was being crossed. But that would be too late to avoid the collision. The evidence of the Sub-Inspector already referred to is more cogent and satisfactory in this regard. Laxaman Rao, P.W. 56, who had the same opportunity as the driver of seeing the approaching danger says that he heard some passengers murmuring that the train was coming. This was just when the bus was already on the railway track. Having noticed the approaching train, the driver decided to clear the track but in the meantime the collision took place. This evidence establishes that the murmuring by the passengers was too late to prevent the collision because the bus had already crossed the track and the only hope of saving the situation would be to speed up the vehicle, which according to the witness, the driver had done. Unfortunately the bus was too long to pass with the result that the train dashed against the rear side of the bus. The High Court has relied upon the evidence of this Sub-Inspector for coming to the conclusion that the appellant was rash. In fact a portion of his evidence has been quoted verbatim in support of the finding that the appellant was culpably rash. In our opinion, the High Court has completely misread his evidence. One has to only read the evidence as a whole and it is very clear from the evidence that the driver received no warning either from the approaching train or from the passengers in the bus in sufficient time to save the collision. There was no question of the appellant driving the bus in a sprit of bravado or adventure. On seeing the train after he crossed the track the best he could do was to drive as fast as he could

in order to avoid the collision. This cannot be regarded either as bravado or adventure. It is, therefore, impossible to say on the evidence that the appellant was criminally rash.

9. As regards criminal negligence, the High Court has blamed the appellant for not taking note of the road signals. It is stated that on either side of the railway track, some distance away, there were road signals which required a vehicle to stop, and the High Court finds fault with the driver for not stopping the vehicle. According to the High Court the appellant should have first come to a dead stop at the road signal and made sure that there was no train on the railway line. In our opinion, so much precaution was not necessary to be observed in the present case. Where a level crossing is unmanned, it may be right to insist that the driver of the vehicle should stop the vehicle, look both ways to see if a train is approaching and there- after only drive his vehicle after satisfying himself that there was no danger in crossing the railway track. But where a level crossing is protected by a gateman and the gateman, opens out the gate inviting the vehicles to pass, it will be too much to expect of any reasonable and prudent driver to stop his vehicle and look out for any approaching train. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Where the gate is open and there is no train scheduled to pass at the time, the driver would be justified in driving his vehicle through the level crossing. Passenger trains have a time schedule and if a train is expected to come at about the time the appellant reached the level crossing, a regular driver of motor vehicles on that route may, perhaps, be found negligent in crossing the railway track, if by mischance, the gate was open. But the train in the present case was not a passenger train but a goods train and it is not shown that the goods train was scheduled to pass the level crossing just at about the time the bus reached the spot. The appellant may not even know that a goods train would be coming at that moment. We do not, therefore, think that the appellant was guilty of criminal negligence merely because he did not stop when the road signal wanted him to stop. This was a clear case of unavoidable accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass.

10. In the result the appeal succeeds, the order of conviction and sentence is set aside and the appellant is acquitted.

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KIDNAPPING AND ABDUCTION

S. Varadarajan v. *State of Madras*

AIR 1965 SC 942

J.R. MUDHOLKAR, J.- This is an appeal by special leave from the judgment of the High Court of Madras affirming the conviction of the appellant under Section 363 of the Indian Penal Code and sentence of rigorous imprisonment for one year awarded by the Fifth Presidency Magistrate, Egmore, Madras.

2. Savitri, PW 4, is the third daughter of S. Natarajan, PW 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Cooperation. At the relevant time, he was living on 6th Street, LakeArea, Nangumbakkam along with his wife and two daughters, Rama, PW 2, and Savitri, PW 4. The former is older than the latter and was studying in the MadrasMedicalCollege while the latter was a student of the second year B.Sc., class in EthirajCollege.

3. A few months before September 30, 1960 Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S. Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 a.m. and had also seen her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11.00 a.m. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter a word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his, K. Natarajan, PW6, the idea being that she should be kept as far away from the appellant as possible for some time.

4. On the next day, i.e., on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 a.m. and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them went to the house of one P.T. Sami at Mylapore with a view to take that person along with them to the Registrar's office to witness their marriage. After picking up Sami they went to the shop of Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and the appellant purchased two gundus and Tirumangalyam which were selected by Savitri and then proceeded to the Registrar's office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P.K. Mar, who was a co-accused before the Presidency Magistrate but was acquitted by him. After the document was registered, the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore where they were found by the police who were investigating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on November 3rd.

6. It is not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that in the first place Savitri had abandoned the guardianship of her father and in the second place that the appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that

"taking" of Savitri out of the keeping of her father has not been established. [Here the court quoted the definition of the offence of "kidnapping from lawful guardianship" as defined in Section 361 of the Indian Penal Code].

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking" out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Nataranjan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who it may be mentioned, had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself, but as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was not an uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area.

8. The learned Judge also referred to a decision in ***R* v. *Kumarasami*** [2 Mad HC Rep 331] which was a case under Section 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, it would be a taking from the husband within the meaning of the section.

9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking". [The court referred to some decisions of the High Court.]

12. It must be borne in mind that while Sections 497 and 498 IPC are meant essentially for the protection of the rights of the husband, Section 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection we may refer to the decision in ***State* v. *Harbansing Kisansing***[ILR 1954 Bom. 784]. In that case Gajendragadkar, J., (as he then was) has, after pointing out what we have said above, observed:

> It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves.

15. The view which we have taken accords with that expressed in two decisions reported in *Cox's Criminal Cases*. The first of them is ***Reg* v. *Christian Olifir***[X*Cox's Criminal Cases,* 402]. In that case Baron Bramwell stated the law of the case to the jury thus:

> I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament (24 and 25 Vict. clause 100 Section 55) for the Act does not say he shall restore her, but only that he shall not take her away.

The jury returned a verdict of guilty in this case because the girl's evidence showed that the initial formation of her intention to leave her father's house was influenced by the solicitations of the accused and by his promise to marry her.

16. The other case is ***Rex* v. *James*** Jarvi [XX *Cox's Criminal Cases*, 249].There Jelf, J., has stated the law thus to the jury:

> Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to convictions; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that the prisoner, he is entitled to your verdict. And, even if you do not believe that he did what he was morally bound to do - namely, tell her to return home - that fact is not by - itself sufficient to warrant a conviction: for if she was determined to leave her home, and showed prisoner that that was her determination, and insisted on leaving with him - or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he yielded to her suggestion, taking no active part in the matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her home either then or some future time, he ought to be found guilty of the offence of abduction.

In this case there was no evidence of any solicitation by the accused at any time and the jury returned a verdict of "not guilty". Further, there was no suggestion that the girl was incapable of thinking for herself and making up her own mind.

17. The relevant provisions of the Penal Code are similar to the provisions of the Act of Parliament referred to in that case.

18. Relying upon both these decisions and two other decisions, the law in England is stated thus in **Halsbury's *Laws of England***, 3rd Edn., Vol. 10, at p. 758:

> The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and afterwards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her.

20. We are satisfied, upon the material on record, that no offence under Section 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly, we allow the appeal and set aside the conviction and sentence passed upon him.

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Thakorlal D. Vadgama v. *State of Gujarat*

AIR 1973 SC 2313

I.D. DUA, J. - This appeal by special leave is directed against the judgment and order of the Gujarat High Court allowing in part the appellant's appeal from his conviction by the Court of the Sessions Judge, Jamnagar under Sections 366 and 376, I. P. C. The High Court acquitted him of the offence under Section 376, I.P.C., but maintained his conviction and sentence under Section 366, I.P.C.

2. According to the prosecution case, the offence under Section 366 I.P.C. took place on January 16, 1967, and the offence of rape with which he was charged was committed on the night between the January 16, and 17, 1967. As observed by the High Court, the background which led to the culmination resulting in the commission of the offences leading to the appellant's trial has been traced by Mohini, the victim of the offences, in the prosecution version, to the latter part of the year 1965. The appellant, an industrialist, had a factory at Bunder Road for manufacturing oil engines and adjoining the factory was his residential bungalow. During the bombardment of Jamnagar by Pakistan in 1965, Mohini's parents came to reside temporarily at Bhrol near Jamnagar. The appellant came to be introduced to that family and on December 18, 1965, which was Mohini's birthday, the appellant presented her with a parker pen. It may be pointed out that Mohini was at that time a school-going girl below 15 years of age. She kept the pen for about 2 or 3 days, but at the instance of her mother, returned it to the appellant. Thereafter, the appellant went to Baroda in his car and he took with him, Mohini, her father Liladhar Jivraj, his manager Tribhovandas, Malati, daughter of Tribhovandas, who was about 12 years old, and Harish, a younger brother of Malati. At Baroda, the appellant negotiated some transaction with regard to the purchase of some land for the purpose of installing a factory there. It appears that there was some kind of impression created in the mind of Mohini's father that he would be employed by the appellant as a manager of the factory to be installed at Baroda. The party spent a night at Baroda and next morning started on their return journey to Jamnagar. During Christmas of 1965 the appellant had a trip to Bombay and during this trip also he took with him, the same party, viz., Mohini, her father, Tribhovandas and Tribhovandas' daughter and son. In Bombay they stayed in Metroplitan Hotel for two nights. According to the prosecution story it was during these two nights that Mohini, Malati and the appellant slept in one room, whereas Mohini's father, Malati's father and Harish slept in another room. On these two nights the appellant is stated to have had sexual intercourse with Mohini. During this trip to Bombay the appellant is also said to have purchased two skirts and waist bands for Mohini and Malati. After their return to Jamnagar, according to the prosecution story, the appellant had sexual intercourse with Mohini once in the month of March, 1965 when she had gone to the appellant's residential bungalow at about 7 p.m. Indeed, Mohini used to visit the appellant's place off and on. During the summer vacation in 1966 the appellant had a trip to Mahabaleshwar in his car. On this occasion, along with Mohini he took her two parents as well as also his own daughter Rekha. On their way to Mahabaleshwar, they stopped at Bombay for two days. After staying at Mahabaleshwar for two days, on their return journey they again halted at Bombay for a night, and then proceeded to MountAbu. At MountAbu they stayed for one day and all of them slept in one room. At about 3.00 a.m. when Mohini's mother got up for going to bath-room and switched on the light, she noticed that the appellant was sleeping by Mohini's side with his hand on her head. Mohini's mother restrained herself and did not speak about what she had seen because the appellant had requested her not to do so. Next morning the party went to Ambaji from where they returned to Jamanager. At Jamnagar Mohini's mother informed her husband about what she had seen during the night at MountAbu, Mohini's father got annoyed and rebuked Mohini. Her mother also warned her against repetition of such conduct. Mohini apologised. The appellant on coming to know of the feeling of Mohini's parents, told her father that Mohini was just like his own daughter Rekha to him and that he would even go to Dattatraya temple and swear by God to that effect. The appellant is stated to have actually taken Mohini's father, Mohini and Rekha to Dattatraya temple in Jamnagar and placing his hands on the heads of Mohini and Rekha swore that they were his daughters. Even after this incident in Dattatraya temple, the appellant once met Mohini when she was returning from her school and took her to his own bungalow in his car. There, he had sexual intercourse with her. It seems that Mohini's

parents came to know about this incident and they rebuked her. Mohini's parents also started taking precaution of not sending her alone to the school. From July, 1966 onwards either the maid-servant or Mohini's mother herself would accompany her to the school. The appellant is stated to have made an effort to contact Mohini during this period. He called her at his house on Saturday, September 24, 1966. Mohini's mother having come to know of this behaviour on the part of the appellant, wrote him a letter, dated September 26, 1966, requesting him to desist from his activities of trying to contact Mohini. Apparently, after this letter there was no contact between Mohini and the appellant in Jamnagar. In October, 1966, however, Mohini had gone to Ahmedabad in school camp and there the appellant contacted her and took her out for a joy ride in company with two of her girl friends. Thereafter, in the months of November, and December, 1965 nothing particular seems to have happened. According to the appellant, however, during those two months, Mohini had written letters to him complaining of ill-treatment by her parents and expressing her desire to leave her parents' house. We would refer to those letters a little later. Early in January, 1967 the appellant is alleged to have told Mohini to come to his bungalow. On January 16, 1967, Mohini started for her school with a school book and two exercise books, in the company of her mother Narmada who had to go to Court for some work. Upto the Court premises, they both went together where Smt Narmada stayed on and Mohini proceeded to her school. Instead of going to her school, she apparently was to the appellant's factory, according to a previous arrangement. There the appellant met her and took her inside his motor garage. From there she was taken to the attached room and made to write two or three letters on his dictation. She did so while sitting on two tyres. These letters were stated to have been addressed to her father, to the District Superintendent of Police of Jamnagar, and to the appellant himself. These letters contained complaints of ill-treatment of Mohini by her father and mother and information about the fact that she was leaving for Bombay after taking Rs. 250 from the appellant. According to the postal stamps, these letters appeared to have been cleared from the post office at 2.30 p.m. on January 16, 1967. Thereafter, according to the prosecution version, Mohini was made by the appellant to sit in the dickey of his car which was taken to some place, Mohini remaining in the dickey for some hours. She was then taken to the office of his factory at midnight and there he had sexual intercourse with her against her will. After the sexual intercourse, there was some sound of motor car entering the compound whereupon the appellant took her inside the cellar in the office and asked her to sit there. After about an hour the appellant came and took her from the cellar to his garage where she was again made to remain in the dickey. It appears that the following morning the appellant told Mohini that he was called to the police station. He went there in his car with Mohini in the dickey and then he and the police man came back to his bungalow. The police man went inside the bungalow and the appellant parked the car in his garage. He took Mohini out of the dickey and told her to go to the inner room of the garage. This inner room had four doors. One of them opened on the main road and another m the garage. Feelling thirsty, Mohini went out in the garden and saw a Mali working there whom she asked for water. It appears that at about 6.30 p.m. the appellant came to the inner room and promised to bring some food, water and clothes for Mohini, telling her to wait for him in that room. After some time, he returned with food, water and clothes. Mohini changed her clothes; washed her face and started taking her meal. While doing so, she felt that some motor car had come into the compound. The appellant told her that police had come and, therefore, she must leave through the back door and go to the road-side directing her to go towards Gandhinagar and wait there for him. Leaving her food unfinished, Mohini went out and waited near Gandhinagar at a distance of about one furlong from the appellant's garage. It was here that she was traced by the Police Sub-Inspector Chaudhary who came there with the appellant in the latter's car at about 9.00p.m. From the dickey of the appellant's motor car, one bedding and some clothes belonging to Mohini, viz., skirt, blouse, knickers and petticoat were found. These clothes were wet. Her school books and two exercise books were also found there. In the inner room of the garage was found unfinished food and utensils which bore the name of the appellant. Mohini was sent for medical examination by the Lady Medical Officer, but the Medical Officer did not find any symptoms of forcible sexual intercourse.

3. Turning now to the scene at the house of Mohini's parents, after her mother Smt Narmada finished with the court work, she returned to her house. They had a visitor Dinkerrai from Rajkot. While they were

all at home some school girls informed Mohini's mother that Mohini had not gone to the school that day. Smt Narmada at once suspected the appellant and therefore went to his house along with the Dinkerrai. On enquiry from the appellant, he expressed his ignorance about Mohini's whereabouts. He, however, admitted that she had come to him for money but had gone away after taking Rs. 250/- from him. This according to him had happened between 4 and 5.30 p.m. on that day *viz*., January 16, 1967. Mohini's father then lodged complaint with the police at about 7.20 p.m. on that very day. The Police Sub-Inspector visited the appellant's bungalow in the night between 16th and 17th of January and searched the bungalow but did not find Mohini there. Thereafter, the Sub-Inspector again went to the appellant's bungalow on the morning of the 17th January and attached some letters and other papers produced by the appellant. He also went to the appellant's office and inspected the books of account for the purpose of verifying whether there was any entry about the payment of Rs. 250 to Mohini. Meanwhile, Mohini's father Liladhar received a letter bearing post mark, dated January 16, 1967 which was produced by him before the Police Sub-Inspector. On the night of 17th January, Police Sub-Inspector Chaudhary went to the appellant's bungalow and it was this time that Mohini heard the sound of a motor car and left the garage at the instance of the appellant leaving unfinished the food she was eating. In the inner room, next to the garage, were found Mohini's clothes, a lady's purse, one comb, 2 plastic buckets full of water, one lantern and some other articles. From the dickey of the appellant's car on search were also found skirt, one blouse a petticoat and one book two exercise books as already noticed. All these articles belonged to Mohini. This in brief is the prosecution story.

4. The appellant admitted that he had developed intimate relations with the family of Mohini, but denied having presented to her a Parker pen in December, 1965. He also admitted his trips to Baroda and Bombay in December, 1965 when he took with him Mohini, her father, Malati, her father and Malati's brother. He admitted having stayed in Metropolitan Hotel at Bombay but denied that he, Mohini and Malati had slept in one room and that he had sexual intercourse with Mohini during their stay in this hotel. He also denied having sexual intercourse with Mohini in the month of March, 1966. He further denied having purchased skirts and waist bands for Mohini and Malati in Bombay in December, 1965. The trip to Mahabaleshwar during summer vacation and also the trip to MountAbu were admitted by the appellant but he denied having found sleeping with Mohini by Mohini's mother at MountAbu. He admitted the incident of Dattatraya temple in Jamnagar but this he explained was due to the fact that Mohini's parents had heard some false rumours about his relations with Mohini, and that he wanted to remove their suspicion. He further admitted that in the evening of 16th January, Narmada and Dinkerrai had approached him to enquire about Mohini's whereabouts but according to him Mohini had merely taken Rs. 250/- from him without telling him as to where she was going. He denied having told Dinker Rai that Mohini had gone to Bombay. According to his version, Mohini approached him on January 16, 1967 and requested him to keep her at his house for about 15 days because she was tired of harassment at the hands of her parents. She added that she would make her own arrangements after 15 days. The appellant expressed his inability to keep her in his house and suggested that he would take to her parent's house and persuade them not to harass her. She, however, was firm and adamant in not going back to her parent's house at any cost. According to the appellant, the reason for falsely involving him in this case was that Mohini's father wanted the appellant to appoint him as a manager at Baroda where the appellant was planning to start a new factory. The appellant having declined to do so because he had many senior persons working in his office, Mohini's father felt displeased and concocted the false story to involve him.

5. The trial court in exhaustive judgment after considering the case from the all relevant aspects came to the conclusion that Mohini was born on September 18, 1951 and then the medical evidence led in the case also showed that she was above 14 and below 17 years of age during the relevant period. She was accordingly held to be a minor on the day of the incident. If, therefore, the appellant had sexual intercourse with her even with her consent, he would be guilty of rape. Mohini was believed by the trial court when she stated that the appellant had sexual intercourse with her at the earliest possible opportunity as this was corroborated by the medical evidence. The trial court found no reason for her to stake her whole life by making false statement about her chastity, nor for her parents to encourage or induce her to come out with

a false story, there being no enmity between the appellant and the family of Mohini with respect to any matter, which would induce them to charge him falsely. The appellant's explanation that as a result of his refusal to appoint Mohini's father as a Manager of his factory at Baroda, she had, in collusion with the parents, concocted this story was considered by the trial court to be too far fetched to be worthy of belief. In fact, according to the trial court it was the appellant who had made a suggestion about appointing Mohini's father as his Manager at Baroda and this explained why Mohini's father was taken by the appellant to Baroda when he paid a visit to that place for purchasing land. The court found no other cogent reason for taking Mohini's father to Baroda. The trial court in express terms disbelieved the appellant's explanation. That court also came to the conclusion, on consideration of the evidence and bearing in mind the common course of human conduct, that it was the appellant who had induced Mohini to leave her parent's house on the day in question and to have sexual intercourse with her. The trial court also considered that part of Mohini's statement that when she went to the appellant's place, he told her to return to school, suggesting that he would take her to her parents and persuade them not to harass her and, it expressed its undoubted opinion that the appellant had used these words to a make a show of being her well-wisher, so that, if some proceedings were started against him, he could put forth the defence that he had kept Mohini at his house only at her own request and not with the object of keeping her out of her parents' custody for having sexual intercourse with her. The trial court got support for this view from the letters got written by the appellant in Mohini's handwriting. This is what that court said in this connection:

> There is, therefore, no doubt in my mind that the accused had prepared all this material so that in case criminal proceedings were taken against him by Mohini's parents, he may be able to lead possible defence of his innocence. Nothing prevented the accused from returning Mohini to her parents. In any case, even if it were held that it was not the duty of the accused to return Mohini to her parents, it can equally be said that it was not legal on the part of the accused to secretly confine Mohini at his place and have sexual intercourse with her.

The trial court then quoted the following passage from the case of ***Christian Olifier***, reported in 10 Cox. 420:

> Although she may not leave at the appointed time and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave.

On the basis of this observation, the trial court held that in the present case, the inducement given by the appellant operated on Mohini's mind to stay in his house and do as he told her to do. The trial court on a consideration of the circumstances of the case and of the subsequent conduct of the appellant came to the definite conclusion that Mohini had gone to the appellants place at his instance and subsequently taking advantage of that position she was persuaded by the appellant to stay there. The appellant was accordingly held guilty under Sections 366 and 376, I.P.C. Under Section 366 I.P.C., he was sentenced to rigorous imprisonment for 18 months and under Section 376, I.P.C. to rigorous imprisonment for two years and also to fine of Rs 500/- and in default, to further rigorous imprisonment for six months. The substantive sentences of imprisonment were to run concurrently.

6. On appeal by the appellant, the High Court also considered the matter at great length and in a very exhaustive judgment, the appellant's conviction under Section 376 was set aside and he was acquitted of that offence. This acquittal was ordered because the charge being only for sexual intercourse on the night of January 16, 1967 the evidence of Mohini in support of that offence was not accepted as safe and free from all reasonable doubt, in the absence of independent corroboration. In adopting this approach the High Court seems to us to have been somewhat over indulgent and unduly favourable to the appellant with respect to the offence under Section 376, I.P.C. but there being no appeal against acquittal, we need say nothing more about it. The appellant's conviction for the offence punishable under Section 366, I.P.C. and the sentence for that offence were, however, upheld. The High Court felt that the story of Mohini with regard to the appellant's call about 3 or 4 days before the incident in question was so natural and so highly probable

that it felt no hesitation in accepting it. The circumstances preceding the incident were considered by the High Court to be sufficiently telling to lend assurance that it was quite safe to act upon her testimony. Her account was considered to be quite truthful and, therefore, acceptable. Mohini's version that the appellant had told her about 3 or 4 days before the incident of January 16, 1967 that he would keep her permanently at his place provided sufficient temptation to the school-going girl like Mohini to go to the appellant, leaving her parental home. This was all the more so because in the past year or so, the appellant had treated Mohini very fondly by taking her out on trips to different places in his own car and had also lavishly given her gifts of articles like costly pens and silver band. The High Court also took into consideration the attitude adopted by Mohini's mother in this connection. She had very discreetly warned the appellant in a dignified and respectful language to leave Mohini alone and also expressed her disappointment and unhappiness at the manner in which the appellant used to behave towards Mohini. The High Court considered a part of Mohini's version, as to how she was kept in the dickey of the appellants car on the January 16 and 17, 1967, to be improbable and to have been exaggerated by her, but this was considered to be due to the fact that like a school-girl that she was, she introduced an element of sensation in her story. Her complaint about intercourse on this occasion was not accepted for want of independent corroboration. The medical evidence also suggested that there was no presence of spermatozoa when vaginal swab was examined. It was on this reasoning that the offence under Section 376, I.P.C. as charged was held not to have been proved beyond doubt. The presence of Mohini in the appellant's house and also in his garage on the January 16 and 17 was held by the High Court to be fully established on the record. The version given by Mohini was held to be fully corroborated by the surrounding circumstances of the case and by the recoveries of various articles belonging to her. The High Court also came to the positive conclusion that there was no unreasonable delay on the part of the investigating authorities to record Mohini's statement. The suggestion on behalf of the appellant that various articles belonging to Mohini and the utensils found in the inner room of the appellant's premises were planted, was rejected outright. The High Court in a very well-reasoned judgment with respect" to the offence under Section 366, I. P. C., came to the conclusion that the appellant had taken Mohini out of the keeping of her parents (her lawful guardian) with an intention that she may be seduced to illicit intercourse. This is what the High Court observed:

> Having come in contact with the family of Mohini in about November 1965, the appellant cultivated relationship with them to such an extent that he took Mohini and her parents out on trips in his car spending lavishly by staying in hotels in Ahmedabad, Bombay, Mahabaleshwar and MountAbu. He also presented Mohini with a parker pen on December 18, 1965. Within a few days thereafter he purchased by way of gift to Mohini skirt, silver waist-band which as per unchallenged testimony of Mohini was worth about Rs 12/-. He was actually found by the side of Mohini in Mohini's bed by Mohini's mother at MountAbu, his connection with Mohini was suspected and in spite of that as the letters of Mohini show he was in correspondence with her without the knowledge of her parents. Mohini was a school-girl of immature understanding having entered her 16th year less than a month before the incident. Out of emotion she wrote letters to the appellant exaggerating incidents of rebuking by her mother and beating. She however was quite normal from January, 1967. The appellant having come to know about the frame of her mind disclosed from the letters of November and December, 1965, took chance to take away this girl from her parents. With that view he told Mohini about 4 days before 16th January, 1967 to come to his house and added that he will keep her with him permanently. This possibly caught the imagination of the girl and the result was that on 16th January, she left her father's house with bare clothes on her body and with school books and went straight to the appellant. The appellant in order to see that her view to his factory during day time may not arouse suspicion of other invented the story of giving Rs 250 to Mohini and also got written 3 letters by Mohini addressed to himself, the District Superintendent of Police, Jamnagar and Mohini's father. He kept her in the garage of his bungalow for 2 days, tried to secret her from police and her parents and had already made attempt on 16th to put police and parents of Mohini on wrong track. There is no scope for an inference other than the inference that Mohini was kidnapped from lawful guardianship, with an intention to seduce her to illicit

intercourse. The intention contemplated by Section 366 of the Indian Penal Code is amply borne out by these circumstances. Therefore, the conviction of the appellant under that section is correct and has to be maintained.

7. As already observed the appellant was acquitted of the offence under Section 376, I.P.C. but his conviction and sentence under Section 366, I.P.C was upheld.

8. In this Court, Shri Dhebar addressed very elaborate arguments and took us through considerable part of the evidence led in the case with the object of showing that the conclusion of the two courts below accepting the evidence led by the prosecution with respect to the charge under Section 366, I.P.C. is wholly untrustworthy and no judicial mind could ever have accepted it. After going through the evidence to which our attention was drawn, we are unable to agree with the appellant's learned counsel. Both the courts below devoted very anxious care to the evidence led in the case and the circumstances and the probabilities inherent in such a situation. They gave to the appellant all possible benefit of the circumstances which could have any reasonable bearing in his favour, but felt constrained to conclude that the appellant was proved beyond reasonable doubt guilty of the offence under Section 336, I.P.C.

9. The appellant's main argument was that it was Mohini who, feeling unhappy and perhaps harassed in her parents' house, left it on her own accord and came to the appellant's house for help which he gave out of compassion and sympathy for the helpless girl in distress. Mohini's parents were, according to the counsel, unreasonably harsh on her on account of some erroneous or imaginary suspicion which they happen to entertain about the appellant's attitude towards their daughter or about the relationship between the two, and that it was primarily her parents' insulting and stern behaviour towards her which induced her to leave her parental home. It was contended on this reasoning that the charge under Section 366, I.P.C. was in the circumstances unsustainable.

10. The legal position with respect to an offence under Section 366, I.P.C. is not in doubt. In ***State of Haryana* v. *Rajaram***[(1973) 1 SCC 544] this Court considered the meaning and scope of Section 361, I.P.C. and it was said there:

> The object of this section seems as much to protect the minor children from being seduced for improper purpose as to protect the rights and privileges to guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words takes or entices any minor out of the keeping of the lawful guardian of such minor in Section 361 are significant. The use of the word 'keeping' in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud, persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.

In the case cited reference has been made to some English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force of a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducements by previous promise or persuasion were held in some English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the same seems to us to be the position under our law. The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or

allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I.P.C. are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case. In the case before us, we cannot ignore the circumstances in which the appellant and Mohini came close to each other and the manner in which he is stated to have given her presents and tried to be intimate with her. The letters written by her to the appellant mainly in November, 1966 (Exhibit P-20) and in December, 1966 (Exhibit P-16) and also the letter written by Mohini's mother to the appellant in September, 1966 (Exhibit P-27) furnish very important and essential background in which the culminating incident of January 16 and 17, 1967 has to be examined. These letters were taken into consideration by the High Court and in our opinion rightly. The suspicion entertained by Mohini's mother is also in our opinion, relevant in considering the truth of the story as narrated by the prosecutrix. In fact, this letter indicates how the mother of the girl belonging to a comparatively poorer family felt when confronted with a rich man's dishonourable behaviour towards her young, impressionable immature daughter; a man who also suggested to render financial help to her husband in time of need. These circumstances, among others, show that the main substratum of the story as revealed by Mohini in her evidence, is probable and trustworthy and it admits of no reasonable doubt as to its truthfulness. We have, therefore, no hesitation in holding that the conclusions of the two courts below with respect to the offence under Section 366, I.P.C. are unexceptionable. There is absolutely no ground for interference under Article 136 of the Constitution.

11. On the view that we have taken about the conclusions of the two courts below on the evidence, it is unnecessary to refer to all the decisions cited by Shri Dhebar. They have all proceeded on their own facts. We have enunciated the legal position and it is unnecessary to discuss the decisions cited.We may, however, briefly advert to the decision in ***S. Varadarajan*** **v.** ***State of Madras***[AIR 1965 SC 942] on which Shri Dhebar placed principal reliance. Shri Dhebar relied on the following passage at page 245 of the report:

> It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to 'taking' out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan, she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law 'taking'. There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant.

From this passage, Shri Dhebar tried to infer that the case before us is similar to that case, and, therefore, Mohini herself went to the appellant and the appellant had absolutely no involvement in Mohini's leaving her parents' home. Now the relevant test laid down in the case cited is to be found at page 248:

> It must, however, be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what, she was doing voluntarily joins the accused person In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.
>
> It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'.

It is obvious that the facts and the charge with which we are concerned in the present case are not identical with those in ***Varadarajan*** case. The evidence of the constant behaviour of the appellant towards Mohini for several months preceding the incident on the 16th and 17th January, 1967, completely brings the case within the passage at p. 248 of the decision cited. We have before us ample material showing earlier allurements and even of the appellant's participation in the formation of Mohini's intention and resolve to leave her father's house. The appellant's conviction must therefore, be upheld.

In so far as the question of sentence is concerned, we are wholly unable to find any cogent ground for interference. The conduct and behaviour of the appellant in going to the temple and representing that Mohini was like his daughter merely serves to add to the depravity of the appellant's conduct, when once we believe the evidence of Mohini with respect to the offence under Section 366, I. P. C. Though the appellant has been acquitted of the offence of rape, for which he was also charged, we cannot shut our eyes to his previous improper intimacy with Mohini on various occasions as deposed by her. They were not taken into account as substantive evidence of rape on earlier occasions for reasons best known to the prosecution and the charge under Section 376, I P. C. was not framed with respect to the earlier occurrences. But the previous conduct of the appellant does clearly constitute aggravating factors. The sentence is, in our view, already very lenient.

12. This appeal must, therefore, fail and is dismissed.

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Anversinh Alias Kiransinh Fatesinh Zala v. State of Gujarat

(2021) 3 SCC 12

Surya Kant, J: This criminal appeal has been heard through video conferencing.The appellant- Anversinh impugns the judgment pronounced by the High Court of Gujarat dated 28.07.2009 by which his conviction under Section 376 of the Indian Penal Code, 1860 ("IPC") was overturned, but the charge of kidnapping under Sections 363 and 366 of IPC was upheld and consequential sentence of rigorous imprisonment of five years was maintained.

2. The complainant - Kiransinh Jalamsinh (PW-1) when came back from work on the night of 14.05.1998, he was informed by his wife that their eldest sixteen-year-old daughter (PW-3; hereinafter, "prosecutrix") had not returned home. Educated till Class VII, the prosecutrix worked as a maid; sweeping and mopping a few hours every noon and evening. The complainant-father made enquiries at her workplace where he learnt from a watchman that his daughter hadn't come for her second shift and that she was last seen coming out of the vacant Bungalow No. 4 of the Ramjani Society with the appellant. It was learnt upon enquiry that the appellant had left for his home in Surpur with the prosecutrix. The complainant rushed to the appellant's home with his uncle and brother-in-law but could not trace the prosecutrix's whereabouts. After returning to Ahmedabad, a police complaint was registered on 16.05.1998. The police were able to locate both the appellant and the prosecutrix to a farm near Modasa, from where they were brought back to Ahmedabad on 21.05.1998. After medical examination and seizure of her clothes, the prosecutrix was reunited with her family.

3. The prosecution examined eight witnesses and adduced twelve documents in order to prove their case that the minor prosecutrix was forcibly taken by the appellant with the intention of marriage and later subjected to sexual intercourse against her will. The prosecutrix's father (PW-1) corroborated the version of events noted above and testified that his daughter who was aged around 15 years had been taken from his custody without his consent. He additionally deposed that he was informed by the prosecutrix's friend, Rekha, that she had communicated a message from a boy to the prosecutrix asking her to come to 'Sardarnagar'. PW-2, an assistant teacher at the prosecutrix's primary school, brought the school records and testified that her date of birth at the time of admission was recorded as 08.02.1982. The prosecutrix (PW-3) identified the appellant and deposed that she had been caught by him on her way to work and was forcibly taken in an auto-rickshaw to a nearby bus stand from where she was transported by bus to the appellant's village. She further claimed to have repeatedly been raped and pressurised into performing marriage with the appellant. The prosecutrix nevertheless admitted during cross- examination to being in love with the appellant, having had consensual sexual intercourse with him on a prior date and also having met him outside her home on previous occasions.

4.It further emerged that during her alleged kidnapping, she was seated with other passengers on the back seat of the auto rickshaw whereas the appellant was on the front seat. She admitted to spending a week at the appellant's village where both went to work together and were living akin to husband and wife. PW-4 and PW-6 who were panch witnesses to the recording of the FIR, physical condition of the prosecutrix and seizure of the prosecutrix's clothes, both turned hostile and discarded the prosecution's version. PW-5, being a Doctor at the Civil Hospital, proved the medical record and injury certificates showing that the prosecutrix had indeed been subjected to sexual intercourse. Finally, PW-7, was the police officer who registered the FIR and PW-8 deposed being the Investigating Officer of the case.

5. It is pertinent to mention that the Investigating Officer (PW-8) admitted in his cross-examination that there was no reference to Rekha's statement in the FIR; that the prosecutrix had not stated that the appellant caught her on way to work and that she had been forcefully abducted, or that her modesty was outraged. Instead, PW-8 disclosed that the prosecutrix in her statement under Section 161 of the Code of Criminal Procedure, 1973 ("CrPC") claimed to know the appellant for a month prior to the occurrence, and of having a regular physical relationship in a damaged bungalow near her place of work. After they were caught by the guard while coming out of such bungalow, they had run away to Surpur where they started labour work on the farm of one Bhikabhai to earn a livelihood and co-habit as husband and wife. Besides these oral

depositions, the prosecution also produced documents in the form of birth certificate, medical papers, FSL report, police and other records.

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7. The learned Additional Sessions Judge vide his order dated 16.12.2002 held that the testimony of the prosecutrix unequivocally established that she had been raped three to four times by the appellant, thus meriting his conviction under Section 376 of IPC. It was further observed that although there was a love affair but considering the fact that the prosecutrix was 16 years, 3 months and 6 days old at the time of occurrence and was thus minor, her consent was wholly irrelevant for the charge of kidnapping. In light of the prosecutrix's claim of forcible abduction and discovery along with the appellant, it was also held that the appellant had enticed and lured the minor girl with the intention to have intercourse and marriage, and thus all the ingredients of Sections 363 and 366 of IPC were well established. Considering the serious nature of the offence, the trial Court awarded sentence of one-year rigorous imprisonment and fine of Rs 1,000 (or simple imprisonment of two months in lieu thereof) for offence under Section 363; five years rigorous imprisonment and fine of Rs 5,000 (or simple imprisonment of three months in lieu thereof) for offence under Section 366; and ten years rigorous imprisonment and fine of Rs 10,000 (or simple imprisonment of six months in lieu thereof) for offence under Section 376 of IPC.

8. The appellant assailed his conviction before the High Court claiming that the parties were in love owing to which the prosecutrix had left her parents' home and gone with him at her own free will. Additionally, she never raised any protest or alarm despite numerous opportunities to do so and thus none of the constituents of 'kidnapping' or 'rape' was established.

9. The High Court in its order under appeal observed that the factum of the prosecutrix being in love with the accused having been established beyond any doubt coupled with the fact that they used to meet frequently, the appellant could not be held guilty of committing 'rape' and his consequential conviction and sentence under Section 376 IPC was set aside. However, there being no evidence suggesting that the prosecutrix had consented to be taken from her parents' lawful custody and given her undisputable minority, the appellant's conviction under Sections 363 and 366 of IPC was sustained.

10. The appellant being aggrieved by his conviction under the charge of kidnapping has approached this Court re-asserting his innocence. Learned counsel for the appellant highlighted that the High Court has acknowledged that there was a love affair, frequent meetings, and consensual relationship between the parties, which merited the appellant's acquittal under Section 376 IPC. But in the very same breath, the High Court has also held that the prosecutrix did not willingly leave her parents' custody and had not consented to be taken for marriage. These two findings were canvassed as being mutually contradictory. Reliance was placed on the judgment of this Court in **S. Varadarajan v. State of Madras**,1 to drive home the point that voluntary abandonment of home by a minor girl would not amount to kidnapping, and that in the absence of some active involvement, the appellant could not be said to have 'taken' or 'enticed' the prosecutrix.

11. In contrast, learned State Counsel supported the impugned judgment of conviction. He emphasised on the concurrent findings of the Courts below read with the plain language of the Statute (IPC) and re-iterated that consent of a girl below 18 years could be no excuse in a case of 'kidnapping' within the meaning of Section 361 IPC.

12. Having given our thoughtful consideration to the rival submissions, it appears to us that although worded succinctly, the impugned judgment does not err in appreciating the law on kidnapping. It would be beneficial to extract the relevant parts of Sections 361 and 366 of IPC which define 'Kidnapping from Lawful Guardianship' and consequential punishment. These provisions read as follows:

"361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid]."

13. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. However, mere recovery of a missing minor from the custody of a stranger would not ipso-facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of **King Emperor v. Gokaran and Emperor v. Abdur Rahman.**

14. Adverting to the facts of the present case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established **Thakorlal D Vadgama v. State of Gujarat, (1973)** sexual intercourse and of having an intention to marry her. Although the victim's deposition that she was forcefully removed from the custody of her parents might possibly be a belated improvement but the testimonies of numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him.

15. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age.

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19. Unfortunately, it has not been the appellant's case that he had no active role to play in the occurrence. Rather the eye-witnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuities and maturity to take care of herself. In addition to being young, the prosecutrix was not much educated. Her support of the prosecution version and blanket denial of any voluntariness on her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully.

20. It is apparent that instead of being a valid defence, the appellant's vociferous arguments are merely a justification which although evokes our sympathy, but can't change the law. Since the relevant provisions of the IPC cannot be construed in any other manner and a plain and literal meaning thereof leaves no escape route for the appellant, the Courts below were seemingly right in observing that the consent of the minor would be no defence to a charge of kidnapping. No fault can thus be found with the conviction of the appellant under Section 366 of IPC.

21. Having held so, we feel that there are many factors which may not be relevant to determine the guilt but must be seen with a humane approach at the stage of sentencing. The opinion of this Court in **State of Madhya Pradesh v. Surendra Singh** on the need for proportionality during sentencing must be re-emphasised. This Court viewed that:

"13. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances

bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society."

22. True it is that there cannot be any mechanical reduction of sentence unless all relevant factors have been weighed and whereupon the Court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence. It would thus depend upon the facts and circumstances of each case whether a superior Court should interfere with, and resultantly enhance or reduce the sentence. Applying such considerations to the peculiar facts and findings returned in the case in hand, we are of the considered opinion that the quantum of sentence awarded to the appellant deserves to be revisited.

23. We say so for the following reasons: ***first***, it is apparent that no force had been used in the act of kidnapping. There was no pre- planning, use of any weapon or any vulgar motive. Although the offence as defined under Section 359 and 361 of IPC has no ingredient necessitating any use of force or establishing any oblique intentions, nevertheless the mildness of the crime ought to be taken into account at the stage of sentencing.

24. ***Second***, although not a determinative factor, the young age of the accused at the time of the incident cannot be overlooked. As mentioned earlier, the appellant was at the precipice of majority himself. He was no older than about eighteen or nineteen years at the time of the offence and admittedly it was a case of a love affair. His actions at such a young and impressionable age, therefore, ought to be treated with hope for reform, and not punitively.

25. ***Third***, owing to a protracted trial and delays at different levels, more than twenty-two years have passed since the incident. Both the victim and the appellant are now in their forties; are productive members of society and have settled down in life with their respective spouses and families. It, therefore, might not further the ends of justice to relegate the appellant back to jail at this stage.

26. ***Fourth***, the present crime was one of passion. No other charges, antecedents, or crimes either before 1998 or since then, have been brought to our notice. The appellant has been rehabilitated and is now leading a normal life. The possibility of recidivism is therefore extremely low.

27. ***Fifth***, unlike in the cases of State of Haryana v. Raja Ram and Thakorlal D. Vadgama v. State of Gujarat, there is no grotesque misuse of power, wealth, status or age which needs to be guarded against. Both the prosecutrix and the appellant belonged to a similar social class and lived in geographical and cultural vicinity to each other. Far from there being an imbalance of power; if not for the age of the prosecutrix, the two could have been happily married and cohabiting today. Indeed, the present instance is an offence: mala prohibita, and not mala in se. Accordingly, a more equitable sentence ought to be awarded.

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29. In light of the above discussion, we are of the view that the prosecution has established the appellant's guilt beyond reasonable doubt and that no case of acquittal under Sections 363 and 366 of the IPC is made out. However, the quantum of sentence is reduced to the period of imprisonment already undergone. The appeal is, therefore, partly allowed in the above terms and the appellant is consequently set free. The bail bonds are discharged.

OFFENCES AGAINST PROPERTY

Pyare Lal Bhargava v. *State of Rajasthan*

AIR 1963 SC 1094

K. SUBBA RAO, J. - This appeal by special leave is directed against the decision of the High Court of Rajasthan in Criminal Revision No. 237 of 1951 confirming that of the Sessions Judge, Alwar, convicting the appellant under Section 379 of the Indian Penal Code and sentencing him to a fine of Rs. 200.

2. To appreciate the questions raised in this appeal the following facts, either admitted or found by the High Court, may be stated. On November 24, 1945, one Ram Kumar Ram obtained permission, Ex. PB, from the Government of the former AlwarState to supply electricity at Rajgarh, Khertal and Kherli. Thereafter, he entered into partnership with 4 others with an understanding that the licence would be transferred to a company that be floated by the said partnership. After the company was formed it, put an application to the Government through its managing agents for the issue of a licence in its favour. Ex. PW 15/B is that application. On the advice given by the Government Advocate, the Government required Ram Kumar Ram to file a declaration attested by a Magistrate with regard to the transfer of his rights and the licence to the company. On April 8, 1948, Ram Kumar Ram filed a declaration to that effect. The case of the prosecution is that Ram Kumar Ram was a friend of the appellant, Pyarelal Bhargava, who was a Superintendent in the Chief Engineer's Office, Alwar. At the instance of Ram Kumar Ram, Pyarelal Bhargava got the file Ex. PA/1 from the Secretariat through Bishan Swarup, a clerk, before December 16, 1948, took the file to his house sometime between December 15 and 16, 1948, made it available to Ram Kumar Ram for removing the affidavit filed by him on April 9, 1948 and the application, Ex. PW 15/B from the file and substituting in their place another letter Ex. PC and another application Ex. PB. After replacing the said documents, Ram Kumar Ram made an application to the Chief Engineer on December 24, 1948 that the licence should not be issued in the name of the company. After the discovery of the tempering of the said documents, Pyarelal and Ram Kumar were prosecuted before the Sub-Divisional Magistrate, Alwar, — the former for an offence under Section 379 and Section 465, read with Section 109 of the Indian Penal Code, and the latter for an offence under Sections 465 and 379, read with Section 109, of the Indian Penal Code. The Sub-Divisional Magistrate convicted both the accused under the said sections and sentenced them on both the counts. On appeal the Sessions Judge set aside the conviction under Section 465, but maintained the conviction and sentence of Pyarelal Bhargava under Section 379, and Ram Kumar Ram under Section 379 read with Section 109 of the Indian Penal Code. Ram Kumar Ram was sentenced to pay a fine of Rs. 500 and Pyarelal Bhargava to pay a fine of Rs. 200. Against these convictions both the accused filed revisions to the High Court, and the High Court set aside the conviction and sentence of Ram Kumar Ram but confirmed those of Pyarelal Bhargava. Pyarelal Bhargava has preferred the present appeal.

3. Learned counsel for the appellant raised before us three points. [The first two points raised are not relevant for discussion under section 379 IPC]. The third point which was raised and is relevant here was that on the facts found the offence of theft has not been made out within the meaning of Section 379 of the Indian Penal Code.

8. The facts found were that the appellant got the file between December 15 and 16, 1948, to his house, made it available to Ram Kumar Ram and on December 16, 1948 returned it to the office. On these facts it is contended that the prosecution has not made out that the appellant dishonestly took any movable property within the meaning of Section 378 of the Indian Penal Code. The said section reads:

> Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

The section may be dissected into its component parts thus: a person will be guilty of the offence of theft, (1) if he intends to cause a wrongful gain or a wrongful loss by unlawful means of property to which the person gaining is not legally entitled or to which the person losing is legally entitled, as the case may

be: see Sections 23 and 24 of the Indian Penal Code; (2) the said intention to act dishonestly is in respect of movable property; (3) the said property shall be taken out of the possession of another person without his consent; and (4) he shall move that property in order to such taking. In the present case the record was in the possession of the Engineering Department under the control of the Chief Engineer. The appellant was the Superintendent in that office; he took the file out of the possession of the said engineer, removed the file from the office and handed it over to Ram Kumar Ram. But it is contended that the said facts do not constitute the offence of theft for three reasons, namely (i) the Superintendent was in possession of the file and therefore he could not have taken the file from himself; (ii) there was no intention to take in dishonestly, as he had taken it only for the purpose of showing the documents to Ram Kumar Ram and returned it the next day to the office and therefore he had not taken the said file out of the possession of any person; and (iii) he did not intend to take it dishonestly, as he did not receive any wrongful gain or cause any wrongful loss to any other person. We cannot agree that the appellant was in possession of the file. The file was in the Secretariat of the Department concerned, which was in charge of the Chief Engineer. The appellant was only one of the officers working in that department and it cannot, therefore, be said that he was in legal possession of the file. Nor can we accept the argument that on the assumption that the Chief Engineer was in possession of the said file, the accused had not taken it out of his possession. To commit theft one need not take movable property permanently out of the possession of another with the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person though he intended to return it later on. We cannot also agree with learned Counsel that there is no wrongful loss in the present case. Wrongful loss is loss by unlawful means of property to which the person losing it is legally entitled. It cannot be disputed that the appellant unauthorizedly took the file from the office and handed it over to Ram Kumar Ram. He had, therefore, unlawfully taken the file from the department, and for a short time he deprived the Engineering Department of the possession of the said file. The loss need not be caused by a permanent deprivation of property but may be caused even by temporary dispossession, though the person taking it intended to restore it sooner or later. A temporary period of deprivation or dispossession of the property of another causes loss to the other. That a person will act dishonestly if he temporarily dispossesses another of his property is made clear by illustrations (b) and (l) of Section 378 of the Indian Penal Code.

It will be seen from the said illustrations that a temporary removal of a dog which might ultimately be returned to the owner or the temporary taking of an article with a view to return it after receiving some reward constitutes theft, indicating thereby that temporary deprivation of another person of his property causes wrongful loss to him. We, therefore, hold that the facts found in this case clearly bring them within the four corners of Section 378 of the Indian Penal Code and, therefore, the courts have rightly held that the appellant had committed the offence of theft.

9. No other point was pressed before us. In the result the appeal fails and is dismissed.

* * * * *

State of Karnataka v. *Basavegowda*

(1997) Cr L J 4386 (Kant.)

F. SALDANHA AND **H. N.NARAYAN, JJ.** - The respondent-accused to this appeal was the husband of the complainant Bhagyamma and it was alleged that about 10 days after their marriage, on 30-4-1987 , he took her to the Burudala Bore forest under the pretext of going for the wedding of a friend and that he threatened to kill her unless she parted with all her ornaments. Bhagyamma, finding no other option, removed all her jewellery valued at around Rs. 11,000/- and handed the same over the accused, who wrapped the same in a handkerchief and put it in his pocket. Thereafter, the accused is alleged to have assaulted her with a big stone whereupon, Bhagyamma screamed. The accused continued to assault her with his fists and seeing two other persons coming there, he ran away. Bhagyamma was thereafter taken to the town and ultimately to the hospital. The hospital sent a memo to the police and in the meanwhile, her own relations were informed and they came to the hospital. The police took down the complaint of Bhagyamma after which, they placed the accused under arrest and it is alleged that the ornaments were recovered form his possession under a Panchanama. On completing the investigation, the accused was put up for trial, was charge-sheeted and the case was committed to the court of Sessions because, he stood charged with offences punishable under Section 307, IPC in so far as he had attempted to cause murder and secondly, he was also charged with an offence punishable under Section 392, IPC in respect of the robbery of the jewellery in question. The learned trail judge, after assessing the evidence before him, held that the sole testimony of Bhagyamma was insufficient to prove the prosecution case beyond reasonable doubt principally because, the majority of witnesses had turned hostile. In this background, the accused was acquitted and the State of Karnataka has preferred the present appeal assailing the correctness of the order.

2. The learned S.P.P. has taken us through the evidence of PW 2 Bhagyamma. He has pointed out that the statement of Bhagyamma was recorded in the hospital shortly after the incident took place and that there is no departure from the FIR and other subsequent evidence before the Court. The learned advocate has also pointed out that Bhagyamma has very clearly deposed to the fact that the accused was not treating her well and that he had told her on the day in question that he was taking her to attend the marriage of his friend at Yarehally. On one pretext or the other, he finally took her to the forest, whereupon he picked up a stone and threatened to kill her if she did not give him all the golden ornaments. She has thereafter described the manner in which the accused assaulted her despite the fact that she had parted with her jewellery and she points out that the accused had used the stone in the assault and had caused serious injuries to her chest. Even after she raised an alarm he continued to assault her and it is only after two persons came running there, that the accused ran away. She has also described as to how her relations ultimately came to the hospital and the police also came there. She was retained in the hospital for 7 days as an in patient. Bhagyamma had also taken the police to the scene of offence and pointed out the stone M. O. I which was attached by the police. The broken glass bangles were found at the scene of offence. She has given value of the ornaments at about Rs. 10,500/-. Bhagyamma has been cross-examined at considerable length, but nothing of any consequence has emerged in the cross- examination and at the same time, we need to record that her basic evidence remains unshaken.

3. The learned S.P.P. then relied on only two other pieces of evidence, the first of them being the scene of offence Panchanama on which he relies for purposes of pointing out that the broken glass bangles that were found at that spot in the forest fully support the version of Bhagyamma as also the recovery of the stone. In addition to this, the learned S.P.P. relies on the medical evidence because, he points out that the six injuries on the person of Bhagyamma fully and completely support her evidence as the injuries correspond to the areas where she was assaulted. The most serious of the injuries was injury No.4 which has caused a fracture of the rib. The submission canvassed is that the medical evidence completely corroborates the oral evidence of Bhagyamma. Apart from these two pieces of evidence, the learned S.P.P. has also sought to place reliance on the evidence of recovery of the ornaments because the prosecution has established that after his arrest, the entire set of ornaments were recovered from the pant pocket of the accused and that when he produced them, they were still wrapped in a handkerchief. Learned advocate

submitted that these ornaments happen to be a necklace, earnings and items of personal jewellery which should normally be on the person of Bhayamma and the fact that they were found from the pocket of the accused would fully establish that her version regarding the manner in which the accused took them from her is substantiated.

4. As against this position, the respondent's learned advocate has placed strong reliance on the admission elicited form Bhagyamma that she has subsequently obtained a divorce from the accused and has also remarried. He submits that this is the clearest indication of the fact that Bhagyamma was not happy with the marriage and desired to put an end to it which was why she has framed the accused. As far as this submission goes, we have carefully scrutinised the evidence and we find that nothing has been brought on record to indicate that Bhagyamma was not happy with the marriage at the time when it took place or that she had other intention or for that matter, that she desired to marry some other man. In the absence of any such material, merely because she has subsequently divorce the accused and remarried, would not necessarily indicate that she was hostile to the accused at the time of the incident and that she would go to the extent of fabricating serious charges against him if these were not true. Having regard to the seriousness of the matter and the fact that the accused not only threatened to kill Bhagyamma, but also took away all her ornaments, could have been a very valid and possible ground for her having wanted to thereafter put an end to that marriage. We are therefore unable to discredit Bhagyamma's evidence purely for this reason.

5. The respondent's learned advocate thereafter placed reliance on the medical evidence in support of his plea that the injury to the chest could not have been caused by the stone. It is true that the Doctor has initially opined that such an injury would have been unlikely having regard to the fact that the stone was of the dimension of I0"x 8", but subsequently, the doctor himself has agreed that such an injury could be caused by the stone in question. This in our opinion sets the matter at rest. The learned advocate has also submitted that if the accused was callous enough to threaten Bhagyamma with death and if he had taken her to a lonely place for this purpose, that there is no reason why the accused would have not carried out his intention and that this itself shows that the story is fabricated. His submission is that if the accused had got hold of a large stone and intended using it, that he would most certainly have done so and would not have given Bhgyamma an opportunity to escape. As far as this argument is concerned, we take note of the fact that Bhagyamma was a young adult woman and even if the accused was the stronger of the two, she would not have easily submitted to a fatal attack and she has in fact stated that on the first occasion when the stone was aimed at her, that she was able to avoid it and that she sustained only minor injuries. Cumulatively, therefore, we are of the view that merely because Bhagyamma escaped with some injuries, that it cannot lead to the conclusion that the accused did not assault her at all on that day.

6. We however, do agree with the submission canvassed by the respondent's learned advocate that even if Bhagyamma's evidence were to be accepted, that the charge would still not come within the ambit of Section 307, IPC. Even though Bhagyamma states that the accused threatened to kill her, we would necessarily have to strictly go by what he actually did and it is clear to us from the manner in which he assaulted Bhagyamma, that the acts would not hold him liable for an offence of attempted murder. The learned advocate has submitted that the weapon used and the type of injuries caused are the two crucial factors while assessing questions as to whether there was intention to cause death and he is right in the present instance when he submits that at the very highest, the accused could be held liable for the offence of causing grievous hurt since injury no. 4 indicated that there was fracture of the rib though the other injuries are relatively minor.

7. The respondent's learned advocate then pointed out to us that the majority of witnesses in this case have turned hostile. He submits that this is not a mere co-incidence, but that it very clearly reflects on the type of investigation that has taken place and the high degree of fabrication exaggeration. Why witnesses who have given full and complete statement to the police should thereafter turn hostile is not a matter of conjecture any longer because, it is very clear that the only beneficiary of such a situation is the accused and it would, therefore, be impossible to rule out complicity on the part of the accused when witness after

witness turns hostile. The fact that the majority of witnesses have not supported the prosecution case is therefore, not a factor in favour of the accused, but one which militates heavily against him.

8. The respondent's learned advocate then advanced the submission that the accused was the husband of Bhagyamma and that it is perfectly legitimate for him to keep the wife's ornaments in his custody and that he did so, that the custody does not become unlawful. Learned advocate submission proceeds on the assumption that the husband has every right to be found in possession of a wife's ornaments and that the recovery of the ornaments from him cannot be treated as a guilty circumstance. We do not dispute the fact that under normal situations, a wife may even entrust her ornaments to the husband for safe custody or a prudent or careful husband may, for reasons of safety, keep the ornaments with him or under his control and such an arrangement could never lead to the inference that the husband was disentitled to retain the wife's ornaments and that it is a guilty circumstance against him. Particularly in criminal cases, such facts are not to be considered in a vacuum, but must be looked at strictly in relation to the special situation that prevails in that particular case. We have taken note of the fact that Bhagyamma has very clearly stated in her evidence that these ornaments belong to her as they had been made by her father for her wedding. She also states that they were in her custody and on her person and that the accused under threat, took the ornaments away from her. If the custody of the ornaments has come to the accused under these circumstances, then his possession becomes clearly unlawful. We need to add here that ornaments and personal property belonging to a wife necessarily constitute her personal possessions and divesting a wife of these against her wishes or without her consent would clearly bring the case within the ambit of a criminal offence. It is a misnomer to argue that irrespective of such situation, that the possession of the wife's personal ornaments by husband still continues to be lawful. In our considered view, the extortion of the ornaments from Bhagyamma under threat and the subsequent recovery of these ornaments from the custody of the accused would clearly make him liable for an offence of extortion. Though the learned S.P.P. submitted that even if the case did not qualify for a conviction under Section 392, I.P.C., that on these facts, it would clearly come within the ambit of Section 386, I.P.C because, the ornaments were extorted under the threat of death, we would prefer not to accept the evidence of Bhagyamma without a little dilution because, the F.I.R. indicates a slightly less serious situation. It would be more appropriate, therefore, to record a conviction under Section 384, I.P.C.

9. As regards the rest of the evidence, we would prefer not to refer to it because, the majority of witnesses have turned hostile and their evidence is not of much consequence. It is true that most of them have been cross-examined and have come a full circle, but we are of the view that Bhagyamma's evidence alone which finds considerable support from the other material which we have discussed above, is sufficient to establish the charge against the accused.

10. The learned S.P.P. submitted that the large stone used in this instance, if used as a weapon of assault, was capable of causing death and that it could, therefore, come within the ambit of a deadly weapon. He also submitted that injury no.4. which has resulted in the fracture of a rib is sufficient to bring the case within the ambit of Section 326, I.P.C. The respondent's learned advocate points out to us that the stone in question was a relatively small one and secondly, that the other five injuries that have resulted are all very minor except for injury No.4 which has resulted in the fracture of the rib. There again, he points out that Bhagyamma was not seriously injured and she was fit enough to travel on a bicycle and then go to the hospital and that she has completely recovered within a period of 7 days and he, therefore, submitted that the offence at the highest would come under Section 323, I.P.C We need to point out here that the assault in this case cannot be brushed off as an insignificant one because, a stone was used in a forest against a young wife with the criminal intention divesting her of her jewellery. Having regard to the fact that this incident did not take place in the home and that the accused had taken her to a forest under a false pretext, it is clear that he had a criminal intention of either killing her or seriously injuring her, but that he ultimately did not carry this out. Also, having regard to the medical evidence which lists the fracture of the rib as a serious injury, we are of the clear view that this is a case which would qualify for a conviction under Section 325, I.P.C.

11. On the question of sentence, the learned S.P.P. has submitted that this is one more of the heinous instances where an (avaricious) unscrupulous husband has attacked a newly married wife and that too with the sole purpose of gain. He submits that irrespective of what ultimately happened, the facts clearly disclose that the accused wanted to appropriate the jewellery and get rid of the wife and in this background, he submits that a deterrent sentence is called for. On the other hand, the respondent's learned advocate has prayed for utmost leniency because, he submits that the ultimate injuries were not of extreme seriousness and he puts forward the plea that there is no material to indicate hostility on the part of the accused due to any other reason and that the Court must, therefore, accept the position that Bhagyamma either had some other liaison or that she was not interested in the accused as a husband as she had an intention to marrying some other person and that in this background, there was very strong provocation to the accused. We have discounted this submission, but we need to point out that even assuming that this was the situation, nothing could justify the act of the husband in taking her to a forest extorting her ornaments and then attempting to do away with her. Also, we have taken note of the fact that in many instances, on all sorts of pleas for sympathy, abnormally lenient sentences are awarded by the Courts which have rightly been categorised as flea-bite punishments which not only reduce the justice dispensation system to a mockery of the law, but almost to a joke. It is very wrong on the part of Criminal Courts, when offences of some seriousness are established, to award abnormally low sentences, though we do appreciate the fact that all relevant factors must be taken: into consideration while computing the degree of sentences. In this case, the only extenuating factors in favour of the accused are that he was a young man; that he had no criminal background; and furthermore that he was a rustic person and would therefore qualify for some degree of leniency as he did not have the benefit of either education or acquiring a high degree of enlightenment. It is for these reasons and also because nine years have passed since the incident took place that we are inclined to award a relatively lenient sentence to the accused.

12. The order of acquittal is accordingly set aside. The accused is convicted in the first instance of the offence punishable under Section 325, I.P.C and it is directed that he shall undergo R.I for a period of two years. The accused is also convicted of the offence punishable under Section 384 I.P.C. and it is directed that he shall undergo R.I. for a period of two years. The substantive sentences to run concurrently. The respondent accused shall be entitled to the set-off for the entire period that he has already undergone. The trial Court shall, if the accused has not undergone the requisite sentence and is on bail, take necessary steps to ensure that he is placed under arrest and consigned to prison. In that event, the bail bond of the respondent-accused shall stand cancelled.

13. The appeal accordingly succeeds and stand disposed of, the fees payable to the learned advocate who has represented the respondent accused is fixed at Rs. l,000/-.

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Jaikrishnadas Manohardas Desai v. *State of Bombay*

AIR 1960 SC 889

J.C. SHAH, J. - At a trial held with the aid of a common jury in Case No. 38 of the V Session 1955 before the Additional Sessions Judge, City Court, Greater Bombay, the two appellants were convicted of offences under Section 409 read with Section 34 of the Indian Penal Code. The Additional Sessions Judge sentenced the first appellant to suffer rigorous imprisonment for five years and the second appellant to suffer rigorous imprisonment for four years. In appeal, the High Court of Bombay reviewed the evidence, because in the view of the Court, the verdict of the jury was vitiated on account of a misdirection on a matter of substantial importance, but held that the conviction of the two appellants for the offence under Section 409 read with Section 34 of the Indian Penal Code was, on the evidence, not liable to be set aside. The High Court accordingly confirmed the conviction of the two appellants but reduced the sentence passed upon the first appellant to rigorous imprisonment for three years and the sentence against the second appellant to rigorous imprisonment for one year. Against the order of conviction and sentence, the appellants have appealed to this court with special leave.

2. The facts which gave rise to the charge against the two appellants are briefly these:

On 15-6-1948, the Textile Commissioner invited tenders for dyeing Pugree Cloth. The Parikh Dyeing and Printing Mills Ltd., Bombay - hereinafter to be referred to as "the company" - of which the first appellant was the Managing Director and the second appellant was a Director and technical expert, submitted a tender which was accepted on 27-7-1948, subject to certain general and special conditions. Pursuant to the contract, 2,51,05 ¾ yards of cloth were supplied to the company for dyeing. The company failed to dye the cloth within the stipulated period and there was correspondence in that behalf between the company and the Textile Commissioner. Approximately 1,11,000 yards out of the cloth were dyed and delivered to the Textile Commissioner. On 25-3-1950, the company requested the Textile Commissioner to cancel the contract and by his letter dated 3-4-1950, the Textile Commissioner complied with the request, and cancelled the contract in respect of 96,128 yards. On 20-11-1950, the contract was cancelled by the Textile Commissioner in respect of the balance of cloth and the company was called upon to give an account without any further delay of the balance undelivered and it was informed that it would be held responsible for "material spoiled or not accounted for". On December 4, 1950, the company sent a statement of account setting out the quantity of cloth actually delivered for dyeing, the quantity of cloth returned duly dyed and the balance of cloth viz. 1,32,160 yards remaining to be delivered. Against the cloth admitted by the company remaining to be delivered, it claimed a wastage allowance of 2412 yards and admitted liability to deliver 1,29,748 yards lying with it on Government account.

3. It appears that about this time, the company was in financial difficulties. In December 1950, the first appellant left Bombay to take up the management of a factory in Ahmedabad and the affairs of the company were managed by one R.K. Patel. In June 1952, an application for adjudicating the two appellants insolvents was filed in the Insolvency Court at Ahmedabad. An insolvency notice was also taken out against the two appellants at the instance of another creditor in the High Court at Bombay. Proceedings for winding up the company were commenced in the High Court at Bombay. In the meantime, the mortgagee of the machinery and factory of the company had entered into possession under a covenant reserved in that behalf, of the premises of the factory of the company.

4. The Textile Commissioner made attempts to recover the cloth remaining undelivered by the company. A letter was posted by the Textile Commissioner on 16-4-1952, calling upon the company to deliver 51,756 yards of cloth lying with it in bleached condition to the Chief Ordnance Officer, Ordnance Depot, Sewri, but the letter was returned undelivered. It was ultimately served with the help of the police on the second appellant in October 1952. Thereafter on 7-11-1952, another letter was addressed to the company and the same was served on the second appellant on 25-11-1952. By this letter, the company was reminded that 1,35,726¾ yards of cloth were lying with it on account of the Government and the same had to be accounted for, and that the instructions to deliver 51,756 yards to the Chief Ordnance Officer,

Ordnance Depot, Sewri, had not been attended to. The Textile Commissioner called upon the company to send its representatives to "clarify the position" and to account for the material. After receiving this letter, the second appellant attended at the office of the Textile Commissioner and on 27-11-1952, wrote a letter stating that "the main factors involved in not delivering the goods in finished state was that the material was very old", was "dhobi-bleached in different lots", was "bleached under different conditions and therefore unsuitable for vat colour dyeing in heavy shades", that it varied in length, weight, and finish and had "lost affinity for vat colour dyeing". It was also stated that the company had in dyeing the basic material, suffered "huge losses" estimated at Rs 40,000. It was then stated: "We are, therefore, however prepared to cooperate with the Government and are willing to make good the government's bare cost. Please let us know the detail and the actual amount to be deposited so that we may do so at an early date. We shall thank you if we are given an appointment to discuss the matter as regards the final amount with respect to the balance quantity of the basic material."

5. On December 29,1952, the premises of the company and the place of residence of the appellants were raided, but no trace of the cloth was found. A complaint was then filed with the police charging the two appellants with criminal breach of trust in respect of 1,32,404½ yards of cloth belonging to the Government.

6. There is no dispute that approximately 1,30,000 yards out of the cloth entrusted to the company by the Textile Commissioner for dyeing has not been returned. By its letter dated December 4, 1950, the company admitted liability to deliver 1,29,748 yards of cloth, but this cloth has not been returned to the Textile Commissioner in spite of repeated demands. That the appellants, as Directors of the company had dominion over that cloth was not questioned in the trial court. The plea that there were other Directorsof the company besides the appellants who had dominion over the cloth has been negatived by the High Court and in our judgment rightly. Direct evidence to establish misappropriation of the cloth over which the appellants had dominion is undoubtedly lacking, but to establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.

7. In this case, on a search of the factory on December 29, 1952, the cloth remaining to be delivered by the company was not found. At the trial, the appellants sought to explain the disappearance of the cloth from the factory premises where it was stored, on the plea that it was old and was eaten up by white-ants and moths, and had been thrown away as rubbish. This plea of the appellants was not accepted by the High Court and we think rightly. No information was given at any time to the Textile Commissioner after December 4, 1950, that the cloth had been eaten up by white-ants and moths, and was therefore thrown away or otherwise destroyed. Nor was any evidence led in support of the plea by the appellants.

8. In this court, counsel for the first appellant contended that failure to return the cloth may give rise to a civil liability to make good the loss occasioned thereby, but in the circumstances of the case, the first appellant cannot be found guilty of the offence of criminal breach of trust. Counsel submitted that the first appellant had left Bombay in 1950 and had settled down in Ahmedabad and was attending to a State of Bombayfactory in that town, that thereafter the first appellant was involved in insolvency proceedings and was unable to attend to the affairs of the company in Bombay, and if, on account of the pre-occupation of the first appellant at Ahmedabad, he was unable to visit Bombay and the goods were lost, no criminal misappropriation can be attributed to him. But the case pleaded by the appellant negatives this submission.

The first appellant in his statement before the trial court admitted that he often went to Bombay even after he had migrated to Ahmedabad and that he visited the mill premises and got the same opened by the Gurkha watchman and he found that the heap of cloth lying in the mill was getting smaller every time he visited the mill and on inquiry, he was told by the watchman that every day one basketful of sweepings was thrown away. He also stated that he was shown several places in the compound of the factory where pits had been filled up with these sweepings, and that he found a small heap lying by the side of the "Tulsipipe gutter" and also in the warehouses in the mill premises. It is clear from this statement and other evidence on the record that even after he migrated to Ahmedabad, the first appellant was frequently visiting the factory at Bombay. The evidence also discloses that meetings of Directors were held from time to time, but the minutes of the Directors' meetings have not been produced. The books of account of the company evidencing disbursements to the Directors of remuneration for attending the meetings and the expenses for the alleged collection and throwing away of the sweepings have not been produced. It is admitted by the first appellant that the letter dated 27-11-1952, was written by the second appellant under his instructions. In his statement at the trial, the first appellant stated that he was informed of the letter dated 26-11-1952, from the Textile Commissioner and that he could not attend the office of that officer because he is attending to the insolvency proceedings and that he deputed the second appellant to attend the office and to explain and discuss the position. He then stated, "We had informed the Commissioner that the company was prepared to pay for the cloth remaining after deducting the amount claimed as damages". The letter dated 27-11-1952, was evidently written under the direction of the first appellant and by that letter, liability to pay for the cloth after certain adjustments for losses alleged to be suffered by the company in carrying out the contract was admitted. By the letter dated December 4, 1950, liability to deliver the cloth was admitted and by the letter dated 27-11-1952, liability to pay compensation for the loss occasioned to the Government was affirmed. The appellants who were liable to account for the cloth over which they had dominion have failed to do so, and they have rendered a false explanation for their failure to account. The High Court was of the opinion that this false defence viewed in the light of failure to produce the books of account, the stock register and the complete absence of reference in the correspondence with the Textile Commissioner about the cause of disappearance established misappropriation with criminal intent.

9. Counsel for the first appellant contended that probably the goods passed into the possession of the mortgagees of the assets of the company, but on this part of the submission, no evidence was led in the trial court. Counsel for the first appellant, relying upon the observations in ***Shreekantiah Ramayya Munipalli* v. *State of Bombay***[(1955) 1 SCR 1177] also contended that in any event, a charge under Section 409 read with Section 34 of the Indian Penal Code cannot be established against the first appellant unless it is shown that at the time of misappropriation of the goods, the first appellant was *physically present.* But the essence of liability under Section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under Section 34 is not, on the words of the statute, one of the conditions of its applicability. As explained by Lord Sumner in ***BarendraKumar Ghose* v. *King-Emperor*** [AIR 1925 PC 1, 7] the leading feature of Section 34 of the Indian Penal Code is "participation" in action. To establish joint responsibility for an offence, it must of course be established that a criminal act was *done* by several persons; the participation must be in doing the act, not merely in its planning. A common intention - a meeting of minds - to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of Section 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places. In ***Shreekantiah***case, misappropriation was committed by removing goods from a Government depot and on the occasion of the removal of the goods, the first accused was not present. It was therefore doubtful whether he had participated in the commission of the offence, and this Court in those circumstances held that participation by the first accused was not established. The observations in ***Shreekantiah***case in so far as they deal with Section 34 of the Indian Penal Code must, in our judgment,

be read in the light of the facts established and are not intended to lay down a principle of universal application.

10. The High Court has found that the two appellants were liable to account for the cloth over which they had dominion and they failed to account for the same and therefore each had committed the offence of criminal breach of trust. The High Court observed: "In such a case, if Accused 1 and 2 (Appellants 1 and 2) alone were concerned with the receipt of the goods, if they were dealing with the goods all the time, if they were receiving communications from the Textile Commissioner's office and sending replies to them, and if the part played by each of them is apparent from the manner in which they are shown to have dealt with this contract, then it is a case of two persons entrusted with the goods and a breach of trust obviously being committed by both of them".

11. It was submitted that the High Court erred in finding the appellants guilty of offences under Section 409 of the Indian Penal Code when the charge framed against them was one under Section 409 read with Section 34 of the Indian Penal Code. A charge framed against the accused person, referring to Section 34 is but a convenient form of giving notice to him that the principle of joint liability is sought to be invoked. Section 34 does not create an offence; it merely enunciates a principle of joint liability for criminal acts done in furtherance of the common intention of the offenders. Conviction of an accused person recorded, relying upon the principle of joint liability, is therefore for the offence committed in furtherance of the common intention and if the reasons for conviction establish that the accused was convicted for an offence committed in furtherance of the common intention of himself and others, a reference in the order recording conviction to Section 34 of the Indian Penal Code may appear to be a surplusage. The order of the High Court recording the conviction of the appellants for the offence under Section 409 of the Indian Penal Code is therefore not illegal.

12. It was submitted for the first appellant that the sentence passed against him was unduly severe, and that in any event, no distinction should have been made between him and the second appellant in the matter of sentence. It is evident on the findings accepted by us that property of considerable value has been misappropriated by the first appellant. He was the Managing Director of the company and primarily, he had dominion over the property entrusted to the company. The second appellant was, though a Director, essentially a technician. Having regard to these circumstances, if the High Court has made a distinction between the two appellants, we ought not to interfere with the sentence, which by itself cannot be said to be excessive. The appeal fails and is dismissed.

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Mahadeo Prasad v. *State of West Bengal*

AIR 1954 SC 724

N.H. BHAGWATI, J. - This is an appeal by special leave from a decision of the High Court of Judicature at Calcutta upholding the conviction of the appellant under Section 420 of the Indian Penal Code and the sentence of one year's rigorous imprisonment passed upon him by the Additional Presidency Magistrate of Calcutta.

2.The appellant agreed to purchase from the complainant Dulichand Kheria 25 ingots of tin on 5th May, 1951. The complainant had in his stock 14 ingots only and purchased 11 ingots from the firm of M. Golam Ali Abdul Hussain. These 25 ingots were to be delivered by the complainant at the guddi of the appellant and it was agreed that the price which was fixed at the rate of Rs 778 per cwt. and amounted to Rs 17,324/12/6 was to be paid by the appellant against delivery. The Jamadar of the complainant went to the Guddi of the appellant. The appellant took delivery of the ingots but kept the Jamadar "awaiting and did not pay the price to him. The Jamadar waited for a long time. The appellant went out and did not return to the Guddi and the Jamadar ultimately returned to the complainant and reported that no payment was made though the ingots were taken delivery of by the appellant. The complainant who was induced to part with these 25 ingots of tin by the appellant's promise to pay cash against delivery realised that he was cheated. He therefore filed on 11th May, 1951 his complaint in the Court of the Additional Chief Presidency Magistrate, Calcutta charging the appellant with having committed an offence under Section 420 of the Indian Penal Code. The defence put up was that the appellant had no intention whatever to swindle the complainant, that the transaction was on credit and that the story of the promise to pay in cash was introduced by the complainant to give a criminal complexion to the case. It was alleged that the appellant went of his own accord to the complainant 7 or 8 days after the transaction in order to settle the money to be paid in view of the fluctuations in the price of tin in the market and was arrested at the place of the complainant while he was thus negotiating for a settlement.

3.It transpired in the evidence that the appellant had an overdraft account with the Bank of Bankura Ltd. in which account he had overdrawn to the extent of Rs. 46,696-12-9 as on 4th May, 1951, the overdraft limit being Rs. 50,000. On 5th May, 1951 the appellant hypothecated with the bank 70 ingots of tin as additional cover against the overdraft account. There was no satisfactory evidence to show that these 25 ingots of tin which were taken delivery of by the Appellant from the Jamadar of the complainant were included in these 70 ingots which were thus hypothecated with the bank on this date. There was however sufficient evidence on the record to show that on 5th May, 1951 when such delivery was taken by the appellant he had not with him any assets beyond the margin of the overdraft account to the extent of Rs. 3,303-3-3 which certainly would not go a long way towards the payment of the price of these 25 ingots. The question to be determined by the Court of the Additional Presidency Magistrate was whether having regard to the surrounding circumstances it could safely come to the conclusion that the appellant had no intention whatsoever to pay but merely promised to pay cash against delivery in order to induce the complainant to part with the goods which otherwise he would not have done. The Additional Presidency Magistrate, Calcutta held that the charge against the appellant was proved and convicted him and sentenced him as above. The appellant took an appeal to the High Court against this conviction and sentence passed upon him. The High Court dismissed the appeal and confirmed the conviction and sentence passed upon the appellant by the Additional Presidency Magistrate, Calcutta.

4.The High Court observed rightly that if the appellant had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established. It was common ground that the market of tin was rapidly declining and it went down from Rs. 840 per cwt. in about April 1951 to Rs. 540 per cwt. in about August 1951. Even between 3rd May, 1951 and 5th May, 1951 the two dates when the negotiations for the transaction took place between the parties and the contract was actually entered into, the market declined from Rs. 778 per cwt. to Rs. 760 per cwt. It was therefore

urged on behalf of the appellant that the complainant would be anxious to sell the goods to the appellant and there would be no occasion for the appellant to induce the complainant to part with the goods on a false promise to pay cash against delivery. It was further urged that the appellant was not shown to have had no other resources except his overdraft account with the Bank of Bankura Ltd., that he had miscalculated his capacity to pay the price against delivery and that therefore there was no justification for holding that he had initially no intention to pay for the ingots when they would be delivered to him. It was also urged that the bill (Ex.1) which was given by the complainant to the appellant stipulated that interest at the rate of 12 per cent per annum would be charged on the price of goods which was not paid in cash against delivery and this stipulation went to show that it was only a case of civil liability and did not import any criminal liability on the part of the appellant. It was lastly urged that the appellant was anxious to arrive at a settlement with the complainant and actually went to his shop and was arrested there while negotiating a settlement and this showed that he had harboured no fraudulent intentions against the complainant when he had taken delivery of the ingots.

5. All these contentions which have been urged on behalf of the appellant however are of no avail. The complainant had never known the appellant and had no previous dealings with him prior to the transaction in question. The complainant could therefore not be anxious to sell the goods to the appellant either on credit or even in a falling market except on terms as to cash against delivery. Whatever be the anxiety of the complainant to dispose of his goods he would not trust the appellant who was an utter stranger to him and give him delivery of the goods except on terms that the appellant paid the price of the ingots delivered to him in cash and that position would not be affected by the fact that the market was rapidly declining. There was no question of any miscalculation made by the appellant in the matter of his ability to pay the cash against delivery. He knew fully well what his commitments were, what money he was going to receive from outside parties and what payments he was to make in respect of his transactions upto 4th May, 1951. The position as it obtained on the evening of 4th May, 1951 was that he had not with him any credit beyond a sum of Rs. 3,303-3-3 as above and there is nothing on the record to show that he expected any further payments by 5th May, 1951 to enable him to make the payment of the price against delivery of these ingots. The stipulation as to payment of interest endorsed on the bill would not militate against an initial agreement that the price of the ingots should be paid in cash against delivery. It would only import a liability on the part of the purchaser to pay 12 per cent interest on the price of the goods sold and delivered to him if he did not pay cash against delivery. That would indeed be a civil liability in regard to the payment of interest but would certainly not eschew any criminal liability of the purchaser if the circumstances surrounding the transaction were such as to import one

The anxiety to arrive at a settlement could easily be explained by the fact that the appellant knew that he had taken delivery of the ingots without payment of cash against delivery and the only way in which he would get away from the criminal liability was to arrive at a settlement with the complainant. The state of the overdraft account of the appellant with the Bank of Bankura Ltd., the evidence of the complainant as well as the Jamadar, the hypothecation of 70 ingots of tin by the appellant with the Bank of Bankura Ltd. on the very 5th May, 1951 and the whole of the conduct of the appellant is sufficient in our opinion to hold that at the time when he took delivery of the 25 ingots of tin, the Appellant had no intention whatsoever to pay but merely promised to pay cash against delivery in order to induce the complainant to part with the goods. The appellant was therefore rightly convicted of the offence under Section 420 of the Indian Penal Code and both the courts below were right in holding that he was guilty of the said offence and sentencing him to one year’s rigorous imprisonment as they did. The appeal therefore is without any merits and must stand dismissed.

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Akhil Kishore Ram v. *Emperor*

AIR 1938 Pat 185

ROWLAND, J. -These two applications have been heard together, the facts in both being similar. The petitioner was brought before the Magistrate on six charges which were tried in two batches of three each, and was convicted of cheating on all the charges and sentenced in each trial to undergo rigorous imprisonment for 18 months. These sentences have been directed to run concurrently. He was also sentenced at each trial to pay a fine of Rs. 500 in default to suffer further rigorous imprisonment for six months; the sentences of fine and of imprisonment in default are cumulative. Appeals to the Sessions Judge of Patna were dismissed.

The main argument put forward on behalf of the petitioner is that assuming him to have done those things which the Courts below have found that he did, he has committed no offence and the second contention is that even if the acts amounted to cheating, the sentences imposed are excessive. The facts are that the petitioner Akhil Kishore Ram resides at Katri Sarai, police station Giriak, in Patna District, where in his own name and under thirteen other aliases he carries on a business of selling charms and incantations which he advertises in a number of newspapers in several provinces of India, and dispatches by value payable post to persons answering the advertisements. Six of these transactions have been the subject matter of the charges.

Mr. Manuk at the outset asked us to bear in mind that what he called the materialist attitude which regards spells and charms as a fraudulent pretence and sale of them as a swindle, though widely held, is not shared by a large body of opinion in the East particularly in India and among Hindus, where the efficacy of magical incantations is still relied on by many and thought to have a religious basis; and he maintained that there was nothing in the evidence to show that the petitioner did not propound the spells or incantations advertised by him in good faith and with a genuine and pious belief in their efficacy; he urged that a conviction should not be founded on the mere fact that the Court had not faith in the efficacy of the incantations. We may recognise the existence of contrasting points of view, but I would express their opposition differently. One outlook is exemplified by words which the dramatist Shakespeare puts in the mouth of one of his characters:

> It's not in mortals to command success.
> But we'll do more, Sempronius, we'll deserve it.

This is the mental attitude of those who will spare no effort to secure results by their own endeavours and to whom, even if results fail them there is a satisfaction in having done all that man can do. There are those on the other hand who would like success to come to them but are averse from the effort of securing it by their own sustained exertions; it is not in them to deserve success but they hope by some device to command it. It is to the latter class that the advertisements of the petitioner are designed to appeal.

The advertisement Ex.1 says:

GUPTA MANTRA

A reward of Rs. 100

The objects which cannot be achieved by spending lacs of rupees may be had by repeating this Mantra seven times. There is no necessity of undergoing any hardship to make it effective. It is effective without any preparation. She whom you want may be very hard hearted and proud, but she will feel a longing for you and she will want to be for ever with you when you read this Mantra. This is a "Vashi Karan Mantra". It will make you fortunate, give you service and advancement, make you victorious in litigation, and bring you profit in trade. A reward of Rs.100 if proved fallible. Price, including postage etc., Rs. 270.

Sidh Mantra Ashram, No. 37 P.O. Katri Sarai, Gaya.

Those who answered this advertisement received a printed paper headed "Gupta Mantra". A formula follows, and then the instructions:

Read the Mantra seven times and look at the moon for fifteen minutes without shutting up your eyes even for a moment. Have a sound sleep with desired object in your heart after that and you will succeed.

You should take only the milk of cow, fruit and sweets of pure fresh cow's milk during the day and night time, you should bathe at night and make your mind pure before you begin this process.

No other person should be taken into confidence however dear and nearly related he may be to you. If you allow such things it will lose its effects as it is so prepared that it can be used by only one man and that with strict secrecy.

Sidh Mantra Ashram, Katri Sarai, Gaya.

The leaflets are printed in English, Bengali, Hindi and Urdu; and it would appear from the registers of the post office that over 25,000 clients paid good money for them. Mr. Manuk argues that the Mantras have not been proved to be ineffective and sold with the knowledge of their uselessness; and therefore he says there was no cheating. But that was not what the prosecution set out to prove. The substance of the prosecution case and the findings of the Courts below was that whereas by the advertisement clients were made to believe that "there is no necessity of undergoing any hardship to make it effective" and that "it is effective without preparation", they were disappointed by finding on receipt of the leaflets that in order to work the miracle they must stare unwinking at the moon for fifteen minutes; a feat which if not impossible as some of the prosecution witnesses have represented it to be, is at any rate beyond the powers of ordinary human beings except by long training and preparation. I have pointed out that the advertisement is specially directed to those who are not content to win success by patient preparation and effort, and bids for their custom by the assurance that no hardship or preparation is needed.

The victims concerned in the six transactions which are before us have all said that had they known of the condition precedent to the using of the Mantra, they would never have sent for it; And the Courts below have accepted that evidence. Mr. Manuk argued that readers of the advertisement must have expected that there would be some instructions for its use; that to gaze at the moon for fifteen minutes was an ordinary instruction; and that a condition of this kind was no breach of faith with them. He referred to defence evidence adduced to show that the feat was not impossible, and submitted that his client had been unfortunate in his failure to secure the attendance of more witnesses on the point though he was unable to say that accused was entitled as of right to more assistance than the Court gave him. He also alluded to an offer by the accused to make a demonstration of moon gazing in the presence of the trying Magistrate, which the latter refused. As to that, the Magistrate was quite right. Section 539 B of the Code which empowers the Court to make a local inspection does not contemplate a procedure by which the presiding officer would to all intents and purposes put himself in the position of a witness in the case. The Magistrate

rightly said that the accused could adduce no evidence of any such test. The accused examined as a witness a coal merchant who said that he used the Mantra, that he was able to gaze at the moon for fifteen minutes after some days' practice and that the capital of his business has grown from Rs. 300 to 1500. The feat of which he boasts does not appear to have been witnessed by any impartial observer and cannot be regarded as a well-authenticated record; his business success also rests on his own word only and he is himself related to the accused and thus not a disinterested witness.

The Courts below were fully entitled to refuse to rely on his evidence and to prefer the testimony of prosecution witnesses who have said that the condition attached to the Mantra was impossible or at least beyond the power of ordinary persons. Mr. Manuk argued that the petitioner was not bound to disclose in his advertisement all the procedure that was required to be followed in order to obtain the benefit of the Mantra. That is true; but the advertisement gave a definite assurance that there was no necessity for either hardship or preparation and the condition referred to is contrary to that assurance, on which the witnesses said that they acted, and without which they would not have answered the advertisement. I have no doubt then that the offences charged were committed and the petitioner has been rightly convicted.

There remains the question of sentence. Mr. Manuk contended that at the worst the accused had committed a technical breach of the law and that if the Mantra was in fact genuine and effective he might be, as was argued in the Magistrate's Court, wanting to do good to the universe. Whether the intentions of the accused were beneficent or otherwise can only be inferred from the materials before us, and such as they are I can find more indications in them of a desire to do good to himself. Para 2 of the instructions following the Mantra appears to be designed to secure the monopoly of his secret by the threat of the Mantra losing its effect if disclosed to others. The reader is presumably expected to forget that the vendor is disclosing it to thousands. This clause should also minimise the danger of victims discussing their experiences with one another and thus being moved to take action against the vendor. Should there be any such discussion, the use of the fourteen aliases might prevent the victims from being fully aware that they were dealing with the same person. Then the advertisement is shrewdly drawn to disarm the suspicion with which at first sight the average newspaper reader is apt to regard magic, wizardry and incantations. The reward of Rs. 100 is placed in the forefront. No time is lost in putting forward this assurance of genuineness in the headline and at the foot again it is said "a reward of Rs. 100 if proved fallible". Prospective purchasers are left to hope that by seven times repeating the Mantra they will attain their object whatever it may be with the assurance that in the event of failure they will get Rs. 100 reward and in case they should still be so sceptical as to wonder whether there is not a catch somewhere, there is the added assurance that the Mantra is effective without preparation and without the necessity of undergoing any hardship. If one may judge by the internal evidence, these compositions are the work of no ascetic or dreamer but of a hard-headed businessman with organizing capacity and a flair for publicity. We know that he advertises widely and employs a staff of four clerks. The elements in human nature to which the appeal is made are not industry and patience but laziness and greed. The business is on large scale and the convictions have been in respect of six out of an unknown number of offences. These are considerations against treating the accused too lightly or imposing a nominal sentence. The accused was liable to be sentenced to seven years' imprisonment of either description for any one of the six offences of which he has been convicted, and in my opinion the sentences of substantive imprisonment imposed, namely eighteen months which will amount to no more than consecutive sentences of three months for each offence are not excessive; nor are the fines. I would dismiss the applications and discharge the Rules. Applications dismissed.

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